Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

General Notice

RECORDATION OF TRADE NAME: "TUNE BELT"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On October 19, 1988, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "TUNE BELT" was published in the Federal Register (53 CFR 41012). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than December 19, 1988. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "TUNE BELT" is recorded as the trade name used by Tune Belt, Inc., a corporation organized under the laws of the State of Ohio, located at 2601 Arbor Place, Cincinnati, Ohio 45209. The trade name is used in connection with the clothing, manufactured by Kama Corporation, LTD. in Taipei, Taiwan. "TUNE BELT," is a belt with a pocket made out of nylon lined Neoprene (wet suit material) used as a radio/cassette carrier).

DATE: February 9, 1989.

FOR FURTHER INFORMATION CONTACT: Bettie Coombs, Value, Special Programs and Admissibility Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5765).

Dated: February 3, 1989.

THOMAS L. LOBRED,
Acting Chief,
Value, Special Programs, and Admissibility Branch.

[Published in the Federal Register, February 9, 1989 (54 FR 6359)]

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 134

PROPOSED CUSTOMS REGULATIONS AMENDMENT RELATING TO COUNTRY OF ORIGIN MARKING OF JEWELRY

AGENCY: U.S. Customs Service.

ACTION: Proposed Rule, solicitation of comments.

SUMMARY: This document sets forth a proposed amendment to the Customs Regulations concerning the country of origin marking of jewelry. More permanent methods of marking are proposed to avoid removal of country of origin identifications after importation, but before sale to consumers often for the purpose of deceptively representing the merchandise as made in the United States. Previous methods permitting country of origin marking for jewelry using adhesive labels or string tags would be permitted under the proposed changes only where the size of the article does not permit more permanent marking methods. For other articles, the changes will require that jewelry be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other equally permanent method, or with a similarly marked plastic or metal tag. Comments from interested parties will be considered before a final rule is issued.

DATE: Comments must be received on or before April 11, 1989.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Value, Special Programs & Admissibility Branch, U.S. Customs Service (202) 566–5765.

SUPPLEMENTARY INFORMATION:

Background

Section 304 of the Tariff Act, as amended (19 U.S.C. 1304), generally requires that every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit in a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

The Customs Service normally permits any reasonable method of marking that will remain on the article during handling until it reaches the ultimate purchaser (19 CFR 134.41 and 134.44). This includes the use of paper sticker labels and string tags. However, where it is shown that a particular method of marking is not sufficiently permanent to inform the ultimate purchaser of the country of origin of the article, the Custom Service may require another type of marking which will insure that in all forseeable circumstances, the article will reach the ultimate purchaser with its country of origin marking intact.

Allegations by representatives of the Native American handicrafts industry that some jewelry and craft dealers and wholesalers remove country of origin labels from imported goods and sell them as authentic Native American products were confirmed by a 1985 Commerce Department study for Congress.

By notice of proposed rulemaking in the Federal Register on July 15, 1986 (51 FR 25574), we solicited public comments on a proposal to require by interpretive rule that all foreign-made Native American-style jewelry be indelibly marked with the country of origin by cutting, die-sinking, engraving or stamping. The notice proposed that the country of origin marking may appear on the clasp, or in some other conspicuous location. Alternately, a metal or plastic tag indelibly marked with the country or origin could be permanently attached to the imported article.

The notice further proposed that in those cases where, due to the size or nature of the article, the indelible marking is too small to be read without a magnifying glass, the country of origin should also be indicated on a string tag or adhesive label securely affixed to the article. A string tag or adhesive label would be permitted as the only means of marking in the case of those few articles which are too small to be indelibly marked and do not permit the permanent attachment of a metal or plastic tag (*e.g.*, a small earring).

On August 23, 1988, Congress enacted Pub. L. 100–418, the Omnibus Trade and Competitiveness Act of 1988, which in Section 1907(c) requires the Secretary of the Treasury to prescribe and implement within 1 year of enactment regulations which require indelible and permanent country of origin marking, to the greatest

extent possible, on all imported Native American-style jewelry and Native American-style arts and crafts. The manner of marking country of origin on Native American-style arts and crafts will be dealt with in a separate document.

Analysis of Comments

In response to the notice, 92 written comments were received. Thirty-five of the comments supported the proposal that all foreign-made Native American-style jewelry be permanently marked with the country of origin. The largest group of commenters (42) favored the permanent marking of all foreign-made silver jewelry, 11 commenters said that all foreign-made jewelry should be permanently marked, and one commenter favored permanent marking of all imported gold and silver jewelry. A number of the commenters who favored marking all silver jewelry suggested that pieces made of silver alloys should be marked as well as those made of sterling silver.

Those commenters who favored a requirement for permanently marking all imported jewelry and many of those who favored permanently marking all silver jewelry stated that they did so because of the difficulty in separating Native American-style jewelry from other jewelry styles. A number of commenters suggested definitions of Native American-style jewelry. One commenter defined Native American-style jewelry as jewelry that incorporates traditional Native American design motifs, materials, and construction. Several commenters would include contemporary as well as traditional designs.

The comments suggest three alternative approaches to implementation of the statutory requirement that all Native American-style imported jewelry be permanently marked with the country of origin. One approach would limit the marking of imports to jewelry that looks like Native American-style jewelry. This is the proposal on which comments were received and would include imported jewelry that incorporates traditional Native American design motifs, materials, and construction.

A second approach would require permanent marking of all imported jewelry made of silver or silver alloys and all other jewelry that is of traditional Native American-style. This approach would remove the need to classify the bulk of imported Native American-style jewelry. A third approach would require permanent marking of all imported jewelry without any reference to its relationship to Native American-style. This approach would require marking jewelry that never would be mistaken for traditional Native American-style jewelry.

We invite comments on each of the options. In this rulemaking, we have chosen to propose the third option, which avoids the difficulty of defining the Native American-style (as would the second option); however, we will base out final decision on the weight of the evidence of the public record of this rulemaking and applicable law.

Since the proposal, as expanded, will have more general application, and because of new legislation, we have also determined that new requirements would be more appropriately promulgated as an amendment to Part 134, Customs Regulations, rather than as an interpretative rule, as originally proposed.

FURTHER COMMENTS

Before adopting the proposal as expanded, consideration will be given to any further written comments (preferably in triplicate) that are submitted timely to the Customs Service. We are interested in comments that would help us weigh the costs and benefits of each of the broad implementation strategies described in the Analysis of Comments. We are particularly interested in receiving comments concerning ways in which the proportion of jewelry items subject to marking as proposed herein could be reduced while accomplishing the statutory objective of ensuring the permanent marking of all imported Native American style jewelry. Commenters may be able to suggest types of jewelry that would be easy for Customs and consumers to distinguish from Native American-style jewelry, for example, traditional styles of Asian jewelry. What practical ways exists for Customs to distinguish, on an operational basis, jewelry that might continue to be exempt from the proposed requirements? Are there any circumstances under which foreign patents, trademarks, or certifications would be useful in distinguishing jewelry that does not look like Native American-style jewelry and therefore might properly be exempt from the marking requirements proposed? Are there, in the context of other Federal Government programs, consumer enforcement or education options that would control potential abuses associated with the importation of jewelry not marked in the manner proposed?

We are also interested in information concerning the additional costs that may be imposed on consumers, importers, and others affected directly by the proposed marking requirements. What would be the effect, in terms of costs to consumers, of the proposed marking requirements or of limiting the proposed marking requirements to all imported jewelry made of silver? How would producers and importers be affected? Would there be any measurable cost effect on jewelry wholesalers and retailers?

Submitted comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2110, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the regulation amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was James C. Hill, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 134

Customs duties and inspection, Labeling, Packaging and containers.

Proposed Amendment

It is proposed to amend Part 134, Customs Regulations (19 CFR Part 134), as set forth below:

PART 134—COUNTRY OF ORIGIN MARKING

1. The authority citation for Part 134 would continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote. 11), 1304, 1624.

2. It is proposed to amend section 134.43 by adding a new paragraph designated as paragraph (c) to read as follows:

§ 134.43 Methods of marking specific articles.

* * * * * * *

(c) *Jewelry.* Jewelry shall be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other equally permanent method. The marking, except as indicated further in this paragraph, must appear on the clasp or in some other conspicuous location, or alternately, on a metal or plastic tag indelibly marked with the country of origin permanently attached to the article. In those cases where due to the size or nature of the article the indelible marking is too small to read without a magnifying glass, the country of origin should also be indicated on a string tag or adhesive label will be permitted as the only means of marking in the case of those few articles which are too small to be indelibly

marked and do not permit the permanent attachment of a metal or plastic tag (*e.g.*, a small earring).

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: February 26, 1989.
SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 10, 1989 (54 FR 6418)]

19 CFR Part 162

PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO THE LIABILITY OF COMMON CARRIERS FOR FAILURE TO EXERCISE THE HIGHEST DEGREE OF CARE AND DILIGENCE TO PREVENT UNMANIFESTED NARCOTICS AND MARIJUANA; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; correction.

SUMMARY: On January 31, 1989, a document was published in the Federal Register (54 FR 4835) proposing amendments to the Customs Regulations relating to the liability of common carriers to penalties, seizure and forfeiture for unmanifested narcotics drugs or marijuana. In that document, the phone number of the contact person, Ms. Harriett Blank, was incorrectly stated. The correct number at which Ms. Blank can be reached is (202) 566–8317.

KATHRYN C. PETERSON,
Chief,
Regulations and Disclosure Law Branch

[Published in the Federal Register, February 10, 1989 (54 FR 6420)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

*Judges**

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*Judge Paul P. Rao passed away on November 30, 1988.

Decisions of the United States Court of International Trade

(Slip Op. 89–1)

SNR ROULEMENTS, SNR BEARINGS USA, INC., AND ICSA INDUSTRIA CUSCINATTI S.P.A., PLAINTIFF *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, C. WILLIAM VERITY, JR., SECRETARY OF COMMERCE, AND JAN W. MARES, ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION, DEFENDANTS AND THE TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 88–12–00893

Before DICARLO, *Judge.*

Commerce's determination that an attorney's assumption of responsibility for the actions of computer consultants or experts can serve as part of an adequate deterrent to the disclosure of confidential business proprietary information submitted in import relief cases is not arbitrary, capricious, an abuse of discretion, or contrary to law.

[Motion for injunctive relief denied.]

(Decided January 5, 1989)

Donovan Leisure Newton & Irving (*Pierre F. de Ravel d'Esclapon* and *Thomas R. Trowbridge III*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane E. Meehan*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Douglas S. Cohen*) for defendants.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.*, and *Charles A. St. Charles*) for defendant-intervenors.

DICARLO, Judge: Foreign producers of anti-friction bearings and parts (the "foreign producers") challenge an order of the International Trade Administration of the United States Department of Commerce (Commerce) that unless they consented within 24 hours to the release, under administrative protective order (APO), of computer tapes containing confidential business proprietary information to attorneys representing the United States industry and independent computer consultants hired by the attorneys, Commerce would reject the foreign producers' questionnaire responses in favor of the "best information available."

The Court finds that Commerce may determine that the attorney's assumption of responsibility for the actions of their computer consultants can serve as part of an adequate deterrent to the disclo-

sure of confidential information, that the attorneys in this action demonstrated a need for the information sought and that Commerce properly balanced that need, and that Commerce's determination to release business proprietary data under the terms of the APO is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Background

On March 31, 1988, The Torrington Company filed antidumping petitions to investigate anti-friction bearings imported into the United States from 23 companies located in France, Italy, Japan, Romania, Singapore, Sweden, Thailand, the United Kingdom, and the Federal Republic of Germany. Commerce asked the foreign producers in each of the nine countries to answer questionnaires and submit certain information on computer tapes and in printout form. The foreign producers complied and supplied both computer tapes and printouts. Commerce later determined that the product under investigation should be broken down into five classes or kinds of merchandise: ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bearings, and plain bearings.

A. *Application for Release of Computer Tapes*

In May and June of 1988, attorneys representing the domestic industry and four non-attorneys employed by a computer consultant firm retained by the attorneys (the "computer consultants") applied for release under an APO of the foreign producers' business proprietary information in its various forms. *See* 19 C.F.R. § 353.30(a) (1988). The computer consultants are located in a data processing center in the same building and on the same floor as the law offices of the attorneys for the domestic industry. R. 1, at 1. Requests were made for each of the countries under investigation. The requests included (1) verification reports and exhibits, (2) computer tapes, and (3) floppy disks or diskette data submitted by the foreign producers or created by Commerce. The attorneys asked that four non-attorney computer consultants be allowed to process the electronic data and work with the hard copy at the business premises of the computer consultants. Under the proposed APO, the attorneys agreed to be held responsible for the actions of its computer consultants and their personnel. The attorneys' assumption of accountability subjects them to disciplinary sanctions, including disbarment, should their computer consultants violate the protective terms of the APO.

B. *Partial Consent to Release of Confidential Information*

The foreign producers consented to the release of their business proprietary data submitted in hard copy form to the attorneys for the domestic industry, and Commerce issued an APO granting access to the business proprietary data in hard copy form. The foreign producers objected, however, to any release of (1) verification exhib-

its, (2) customer names, (3) computer tapes, and (4) any information to the computer consultants.

C. *Commerce's Determination to Allow Release of Tapes*

In ruling on the motion to release computer tapes and confidential information to outside computer consultants, Commerce (1) denied access to confidential verification exhibits but granted access to the confidential verification report, (2) denied the request for confidential floppy disks or diskettes, (3) granted (to both the attorneys and their computer consultants) access to expurgated versions of computer tapes already submitted and tapes that would be submitted later in the investigation, (4) granted further release to the computer consultants that information in hard copy form already released to the attorneys, and (5) permitted the computer consultants to analyze the hard copy data and computer tapes at the business premises of the computer consultants. R. 40.

Commerce telephoned the foreign producers on Friday, December 2, 1988, to notify the foreign producers that it was transmitting a letter by telecopy regarding its decision to release under APO copies of the computer tapes. Commerce gave the foreign producers a "twenty-four hour" deadline, in this action only until noon on Monday, to advise Commerce in writing of their intention to comply with Commerce's decision, to be followed by a period of ten business days in which to redact customer or supplier names or identifiers from the computer tapes and serve the attorneys for the domestic industry with one copy of each of the redacted tapes. R. 56. Commerce warned that the failure to comply would result in rejection of relevant portions of questionnaire responses and use of the "best information available" rule in Commerce's final determinations of whether producers in each country were selling in the United States at less than fair value.

D. *Action in the Court of International Trade*

The foreign producers filed an action in this Court on December 5, 1988 for a temporary restraining order preventing Commerce from releasing computer tapes to the attorneys for the domestic industry or any confidential information to their computer consultants. The Court granted the restraining order and further restrained Commerce from rejecting any portion of the questionnaire responses or otherwise penalizing the foreign producers for refusing to release their business proprietary information. The foreign producers also moved for injunctive relief under Rule 65 of the Rules of this Court, contending that Commerce's order is arbitrary and capricious. The producers contend that they were presented with the Hobson's choice of either consenting to the release of their most sensitive confidential data to non-lawyer computer consultants in a form readily conducive to untraceable, instantaneous transfer and copying, or having their questionnaire responses, prepared at substantial cost, ignored in Commerce's determination and thus be pre-

vented from submitting any meaningful evidence. *Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunctive Relief,* at 2–3.

Jurisdiction and Standard of Review

In cases where Commerce *denies* access to confidential business proprietary information, jurisdiction in this Court is based on 28 U.S.C. § 1581(f) (1982), and actions to compel disclosure of that confidential information under protective order are evaluated in this Court *de novo* on the administrative record to determine whether the need of the party requesting the information outweighs the need of the party submitting the information for continued confidential treatment. 19 U.S.C. § 1677f(c)(2) and 28 U.S.C. § 2640(a)(4) (1982); S. Rep. No. 249, 96th Cong., 1st Sess. 100, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 486; *D & L Supply Co.* v. *United States,* 12 CIT ——, 693 F. Supp. 1179, 1181 (1988); *Timken Co.* v. *United States,* 11 CIT ——, 659 F. Supp. 239, 240 (1987).

In cases where Commerce *allows* the release of confidential information under a protective order, as it did in this case, this Court's jurisdiction to review that action is based on 28 U.S.C. § 1581(i) (1982), and the standard of review is whether Commerce's actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A) (1982); 28 U.S.C. § 2640(d) (1982); *Arbed, S.A.* v. *United States,* 4 CIT 132, 133 (1982); *Sacilor, Acieries et Laminoirs de Lorraine* v. *United States,* 3 CIT 191, 542 F. Supp. 1020 (1982).

Discussion

Antidumping and countervailing duty actions require that certain documents, comments, and information be accorded confidential status because even inadvertent disclosure of business proprietary information can be highly damaging and irreparable by conventional legal remedies. *Chevron U.S.A., Inc.* v. *United States,* 11 CIT ——, Slip Op. 87–13 at 6 (Feb. 6, 1987); *Sacilor Acieries et Laminoirs de Lorraine* v. *United States,* 3 CIT 191, 195, 542 F. Supp. 1020, 1025 (1982). The parties concede that a higher risk of unauthorized disclosure of business proprietary information on computer tape as opposed to printouts warrants a heightened level of protection for computer tapes. *See Yale Materials Handling Corp.* v. *United States,* 11 CIT ——, 674 F. Supp. 865, 867 (1987).

1. *Assumption of Liability for Computer Consultants*

Business proprietary information has been released under APO to attorneys because the sanctions for violation of the APO, including disbarment from practice before Commerce under 19 C.F.R. § 355.20(e) (1988) and the further prospect of professional disbarment, have been found sufficient to address the valid concerns of foreign producers and foreign governments that information sub-

mitted in confident might be disclosed. *D & L Supply Co.* v. *United States,* 12 CIT ——, 693 F. Supp. 1179, 1182 (1988); *Chevron U.S.A., Inc.* v. *United States,* 11 CIT ——, Slip Op. 87-13 at 7-8 (Feb. 6, 1987). Commerce's decision to release confidential information on computer tapes to attorneys and their non-attorney computer consultants turns not on the adequacy of sanctions available against the attorneys, but rather their non-attorney computer consultants.

Counsel for SNR argues that the attorneys' willingness to assume liability for the actions of the computer consultants is "illusory," because the consultants are not themselves subject to disbarment. *Supplemental Memorandum in Support of Plaintiffs' Motion for Preliminary Injunctive Relief,* at 3.

Depending on the sanctions available to deter disclosure of confidential information, the court has both denied and permitted the release of confidential computer tapes to computer consultants. In *Yale Materials Handling Corp,* v. *United States,* 11 CIT ——, 674 F. Supp. 865, 867 (1987), the court denied access to computer tapes to outside computer consultants because there were no catastrophic and unavoidable sanctions available to deter the release of confidential information. Commerce had intended to release the tapes to an outside computer firm to copy the tapes and delete customer names prior to protective order release to counsel for petitioner, but neither the petitioner's counsel nor the respondent's counsel agreed to accept responsibility for the protective order data in the hands of an independent computer firm selected by Commerce. The sanctions were accordingly found to be "pale and ineffective." *Id.* Conversely, in *American Brass* v. *United States,* 12 CIT ——, Slip Op. 88-155 at 9-10 (Nov. 8, 1988), the Court granted access to computer tapes to "in-house" computer consultants because the court found that

> third parties such as computer programmers are not *per se* excluded from access to confidential information on computer tape. While it may be unusual to allow access to confidential information to persons other than counsel, as long as a protective order can fashion adequate sanctions to deter disclosure by any third parties who may come into contact with the tapes it is sufficient protection. *Cf. Yale Materials Handling Corp.,* 11 CIT at ——, 674 F. Supp. at 867 (sanctions in a protective order as to outside computer companies did not contain the required degree of deterrence). While the fact that third parties may be required to assist processing of the tapes may be a factor in the decision whether to release confidential information, it will not, in and of itself, preclude access. To conclude otherwise would effectively make computer tapes unavailable in any case where counsel find it necessary to seek the assistance of computer programmers.

The protective order subsequently fashioned in *American Brass* and approved by the Court on December 14, 1988 provides that a breach by a computer systems manager or an economist employed by the

attorneys would "be deemed a breach by counsel for American Brass." *Consent Motion for Amendment of Stipulations and Protective Orders*, at 3, Court Nos. 87–04–00589 and 87–04–00575. Together with the other sanctions in the APO, the attorneys' assumption of liability was found to provide an adequate deterrent to the disclosure of confidential information.

In this investigation Commerce found that the attorneys' assumption of liability provided a sufficient degree of protection to the confidential information:

> We believe that the attorneys' assumption of responsibility for the computer specialists' compliance with the terms of the requested protective orders, the threat of sanctions for violation of the terms of the requested protective orders, the terms and conditions of the requestors' applications for protective orders, and the protective orders themselves provide a sufficient degree of protection for the proprietary data.

R.40, at 6–7.

The Court finds that the attorneys' willingness to assume liability for the actions of their computer consultants is neither hollow nor illusory as counsel for SNR has claimed. The Court finds an analogous situation involving the secretaries of attorneys, who may learn confidential information in the course of typing a confidential brief. Counsel for SNR conceded that secretaries would not be subject to disbarment just as computer consultants would not be subject to disbarment. Although the attorney would likewise bear responsibility if a secretary disclosed confidential information, counsel for SNR argues that "we have to have an element of reason," and that the in-house computer programer employed in *American Brass* is different from a computer consultant who is removed from the attorney's direct supervision. The Court agrees that when sanctions and direct supervision are distant, there is a greater risk of disclosure. This increased risk is, however, a factor for the agency to consider in determining whether to grant applications for access to confidential information. Commerce did consider this risk in this investigation and fashioned an APO that it found sufficient to protect the confidentiality of the business proprietary information.

2. *Assumption of Liability for Foreign Attorneys*

A Belgian attorney was also included in the application for access to confidential information. The foreign producers contested his right of access because he could not be disbarred by an American court. Under the same principles of a principal's responsibility for the actions of its agent that the Court approved for computer consultants, the Court finds that the American attorneys' assumption of liability for the actions of their Belgian colleague provides an adequate sanction.

3. *Balancing Test*

SNR contends that there is no need for the information sought in this investigation, only a desire to have access to the computer tapes. For example, there is no complex model matching as was involved in *Timken Co.* v. *United States,* 11 CIT ——, 659 F. Supp. 239, 240 (1987), because identical products are involved in this investigation. Consequently, SNR argues that the attorneys for the domestic industry could have easily checked the hard copy against Commerce's program. SNR asserts that the attorneys for the domestic industry have asserted nothing more than a "nebulous need" and have not described with sufficient particularity their need for the information sought.

Although disclosure of confidential information is meant to aid in effective advocacy, petitioners' counsel are not empowered to act as an independent investigator to the proceeding. *Monsanto Indus. Chem. Co.* v. *United States,* 6 CIT 241, 243 (1983). Petitioners should not attempt pure duplication of Commerce's function, but rather provide the comment and analysis which will contribute the objectives of the investigation more than it will detract from the confidentiality of the information. *Arbed, S.A.* v. *United States,* 4 CIT 132, 136 (1982).

The law governing the release of confidential information has undergone a steady evolution since the Trade Agreements Act of 1979 first authorized release under APO of confidential information submitted by petitioners and respondents in antidumping and countervailing duty investigations. *See generally* Garfinkel, *Disclosure of Confidential Documents Under the Trade Agreements Act of 1979; A Corporate Nightmare?,* 13 Law & Pol'y Int'l Bus. 465 (1981). The United States is one of the few nations in the world to even allow release of confidential information in these international trade cases. Taylor & Vermlust, *Disclosure of Confidential Information in Antidumping and Countervailing Duty Proceedings Under United States Law: A Framework for the European Communities,* 21 Int'l L. 43 43–44 (1987). Until 1984, Commerce was required to await submission of each party's confidential information before entertaining applications for release describing particularly the information sought, and to make a decision based on the balance of need for the information and the risk of potential disclosure. *See Sacilor, Acieries et Laminoirs de Lorraine* v. *United States,* 3 CIT 191, 542 F. Supp. 1020 (1982).

Under section 619 of the Trade and Tariff Act of 1984, Commerce was given discretion to entertain applications and release data under APO even before the data is filed with the agency:

> Upon receipt of an application, (before or after receipt of the information requested) which describes with particularity the information requested and sets forth the reasons for the request, the administering authority and the Commission may make

> confidential information submitted by any other party to the investigation available under a protective order * * *.

19 U.S.C. § 1677f(c)(1)(A) (Supp. IV 1986). *See* H.R. Rep. No. 725, 98th Cong., 2d Sess. 44–45 (1984). The attorneys for the domestic industry applied for the computer tapes before they were submitted. R. 1–18.

Under section 1332 of the Omnibus Trade and Competitiveness Act of 1988, P.L. 100–418, 102 Stat. 1107, 1207–08, the standards for granting access to confidential information will further ease in future investigations because applicants must make their requests only in general terms rather than with particularity. This provision of the new trade law applies, however, only to those investigations initiated after August 23, 1988. *Id* § 1337, 102 Stat. at 1212.

Under the law in effect in this determination, Commerce was charged with weighing "whether the need of the person requesting the information outweighs the need of the person submitting it for continued confidential treatment." 19 C.F.R. § 353.30(a)(3) (1988). Although Commerce had released the hard copy to the attorneys for the domestic industry, Commerce correctly recognized that "release of the hard copy data did not dictate the future release of the computer tapes." R. 40, at 6. Rather, Commerce applied the balancing test to the computer tapes:

> In complex trade cases, such as the present antidumping investigations, we believe that reasonable measures which ensure the effective advocacy by the relevant domestic industry are consistent with the overall purpose of the trade law and their provisions for participation by interested parties.

R. 40, at 6. Counsel for the domestic industry emphasizes the importance that computer tapes have recently achieved in ensuring effective advocacy in import relief cases:

> with wider use of computers, the data on the computer tapes are perhaps the most important record evidence in an antidumping proceeding. The narrative questionnaire responses serve to explain the computer tape; verification is increasingly an exercise in establishing that the contents of the tape are accurate; revisions and corrections that result after verification typically require the submission of new computer tapes. Thus, it is unfair for the respondents but not the petitioner to have access to the most important evidence relied upon to render the final determination.

Supplemental Memorandum of the Torrington Company re Access to Computer Tapes, at 2.

Recognizing the domestic industry's need for effective advocacy, Commerce found that

> release of the computer tapes under the terms of an APO specifically written to provide a heightened degree of protection, is reasonable, and will significantly assist petitioner's meaningful participation in these investigations. In light of *Timken* and

> *Yale Materials*, the need of petitioner's counsel for respondents computer tape data in these investigations outweighs the interest of the respondents for continued proprietary treatment.

R. 40, at 6.

SNR and the plaintiffs in related cases decided today complain that the fact that Commerce issued only one determination to cover all of them demonstrates that Commerce abdicated its responsibility to apply the balancing test on a company-by-company basis.

Commerce was faced with a single applicant for each of the APOs sought, rather than several law firms with different computer consultants. The applicant sought the tapes of all respondents, not just of one company in each country. Although Commerce stated that all antidumping investigations are complex, R. 40, at 6, Commerce had found that the nine investigations involving 23 companies were extraordinarily complicated within the meaning of 19 C.F.R. § 1671(c)(1)(B):

> [T]hese cases are extraordinarily complicated because they involve unusually large numbers of sales transactions, there are an extraordinarily large number of different products involved, there is further processing by the respondents U.S. subsidiaries before sale to an unrelated party, and because we are investigating allegations that home market sales are being made below the cost of production.

Postponement of Preliminary Antidumping Duty Determination; Antifriction Bearings and Parts Thereof from the Federal Republic of Germany, France, Italy, Romania, Singapore, Sweden, Thailand, and the United Kingdom, 53 Fed. Reg. 27,738 (July 22, 1988). The petitioner thus presented a general need as in *Arbed, S.A.* v. *United States*, 4 CIT 132, 136 (1982).

All of the foreign producers share the valid and important concern for inadvertent disclosure of confidential business proprietary data submitted on computer tape. The nature of the data, including home market prices, United States prices, third country prices, sales data, quantities, and adjustments for transportation costs and circumstances of sale, were again identical.

Commerce's single memorandum in response to a single application did consider the arguments against disclosure raised by each of the companies. Commerce summarized each of the arguments submitted to it and addressed the concerns raised by each of the companies. R. 40, at 2–4. Commerce did not abdicate its duty to balance the needs of each of the parties in this investigation. Under the circumstances of this investigation, the Court finds that Commerce was not required to issue separate memoranda for each of the respondents because the single memorandum addressed the individual concerns raised by each company.

4. *Twenty-four Hour Notice*

Counsel for SNR also contended that it was arbitrary and capricious for Commerce to demand that the foreign producers give their consent within twenty-four hours or else be subjected to the best evidence rule. At oral argument counsel for SNR acknowledged the existence of Commerce's twenty-four hour practice but stated that he "had been fighting Commerce on this for years." Under these circumstances, counsel knew of Commerce's practice, knew that applications for release of confidential information were pending, and could have communicated with the foreign producers or asked for an extension of the deadline. SNR has not been prejudiced in this case because the temporary restraining order from this Court has extended their decision-making time by several weeks.

Conclusion

The Court finds that Commerce may determine that the attorneys' assumption of responsibility for the actions of their computer consultants can serve as part of an adequate deterrent, together with other available sanctions, against disclosure of confidential information, that the attorneys in this action demonstrated a need for the information sought and that Commerce properly balanced that need, and that Commerce's determination to release business proprietary data under the terms of the APO is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(Slip Op. 89–2)

FAG Kugelfischer Georg Schaeffer KGaA, Helmut Elges GmbH, FAG Cuscinetti S.p.A., and FAG Bearings Corp., plaintiffs *v.* United States, U.S. Department of Commerce, C. William Verity, Jr., Secretary of Commerce, and Jan W. Mares, Assistant Secretary for Import Administration, defendants, and The Torrington Co., defendant-intervenors

Court No. 88–12–00901

Before DiCarlo, *Judge.*

In reviewing an administrative protective order, the Court is not to substitute its judgment for that of the agency and draft an APO with more or "maximum" security. Commerce's new regulations may also be used to punish future violations of the administrative protective order.

[Motion for injunctive relief denied.]

(Decided January 6, 1989)

Grunfeld Desiderio Lebowitz & Silverman (*Max F. Schutzman*), and *Adduci Mastriani Meeks & Shill* (*Louis S. Mastriani*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane E. Meehan*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Douglas S. Cohen*) for defendants.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Charles A. St. Charles*) for defendant-intervenors.

DiCarlo, *Judge:* This action is related to *SNR Roulements* v. *United States*, 13 CIT ——, Slip Op. 89–1 (Jan. 5, 1989). In addition to the arguments raised in *SNR*, FAG argues that the APO is deficient in several respects and urges the Court to redraft the APO or remand to Commerce with instructions to draft another APO.

Background

The facts of this case are set forth in *SNR Roulements* v. *United States*, 13 CIT ——, Slip Op. 89–1 (Jan. 5, 1989). An additional fact is that because the German and Italian producers received Commerce's notice and decision only on the morning of December 5, 1988 (with instructions to convey their consent by noon), the German and Italian producers requested an additional 72-hour period within which to advise Commerce whether they agreed to comply with the determination to release the computer tapes. Commerce granted this request for additional time.

Discussion

FAG faults the APO for (1) not requiring that the mainframe computer be purged of all other data before running FAG's data, in order to "maximize" security and avoid the possibility of comingling data from other investigations; (2) not requiring that FAG's data may not be called to a computer screen when another producer's data is also on that screen; (3) not prohibiting multiple computers or their simultaneous use by nonauthorized personnel; (4) not requiring that the computer mainframe be actually located on the premises where the confidential information is to be analyzed; and (5) not containing all of the sanctions available in regulations announced at the time of the December 2, 1988 order from Commerce but which had not yet entered into effect.

A. *"Maximum" Security*

The attorneys for the domestic industry are located on the same floor of the same building as their computer consultants. R. 1, at 1. In their applications, the attorneys and computer consultants agreed that (a) the computer tapes would be stored in a locked safe, vault, or cabinet in the law firm; (b) personnel of the computer consultants could only obtain the computer tapes under supervision of an attorney also covered by the protective order; (c) when the computer consultants were not present and operating the computer to manipulate data on the computer tapes, that data would be deleted from the computer; (d) there would be no telephone modems or other means of dial-up access to the computer where the tapes were

stored; and (e) at the end of each day, or sooner when not in use, the computer tapes would be returned by an attorney to the locked cabinet in the law offices. *Memorandum of the Torrington Company in Opposition to Plaintiffs' Motion for Injunctive Relief,* at 3.

As to FAG's complaints that the APO is deficient, the Court finds that its role is not to substitute its judgment for that of the agency and draft an APO with more or "maximum" security. *See Federal Communications Comm'n* v. *United States,* 381 W.W. 279, 291 (1965); *United States Int'l Trade Comm'n* v. *Tenneco West,* 261 D.C. App. 341, 822 F.2d 73, 76 (D.C. Cir. 1987). Rather, under the "arbitrary and capricious" standard of review, the Court's role is to determine whether the APO in this action reasonably affords the level of security contemplated by the statute.

B. *Additional Sanctions Under New Commerce Regulations*

As to FAG's complaint that the APO does not contain all of the additional sanctions that are available under new Commerce regulations, the Court finds that the regulations now in effect may be applied to any future breaches of the APO under review.

Effective on December 28, 1988, Commerce regulations impose the following sanctions:

> 1. Barring anyone who violates an APO from appearing before the International Trade Administration to represent others;
> 2. Denying future access to confidential information;
> 3. Other administrative sanctions, including (a) striking from the record any information submitted by, or on behalf of, the violating party, and (b) terminating any proceeding in progress or revoking any order in effect; and
> 4. Requiring violators to return all confidential documents and all other materials containing the proprietary information.

Procedures for Imposing Sanctions for Violation of an Antidumping or Countervailing Duty Protective Order, 53 Fed. Reg. 47,916, 47,921 (Nov. 28, 1988) (to be codified at 19 C.F.R. §§ 354.3).

Unlike changes in the standards for granting access to confidential information under section 1332 of the Omnibus Trade and Competitiveness Act of 1988, P.L. 100–418, 102 Stat. 1107, 1207–08, which apply only to those investigations initiated after August 23, 1988, *id.* §§ 1337, 102 Stat. at 1212, Commerce's new regulations are not limited to investigations that commence after their effective date, but may be applied to any breach of an APO after December 28, 1988.

Conclusion

For the reasons in *SNR Roulements* v. *United States,* 13 CIT ——, Slip Op. 89–1 (Jan. 5, 1989), the Court finds that Commerce may determine that the attorneys' assumption of responsibility for the actions of their computer consultants can serve as part of an adequate

deterrent, together with other available sanctions, against disclosure of confidential information, that the attorneys in this action demonstrated a need for the information sought and that Commerce properly balanced that need, and that Commerce's determination to release business proprietary data under the terms of the APO is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(Slip Op. 89-3)

THE ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 87-04-00622

Before RESTANI, *Judge*.

[Remanded.]

(Dated January 6, 1989)

Heron, Burchette, Ruckert & Rothwell (*Thomas A. Rothwell, Jr., James M. Lyons, Joseph A. Vicario, Jr.,* and *Alfred G. Scholle*) for Asociacion Colombiana de Exportadores de Flores.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Jeanne E. Davidson*) Civil Division, United States Department of Justice; *Anne W. White*, Office of the Chief Counsel for Import Administration, United States Department of Commerce for the United States.

Stewart & Stewart (*Terence P. Stewart* and *James R. Cannon, Jr.*) for Floral Trade Council of Davis, California.

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OPINION

RESTANI, *Judge:* This consolidated case is before the court on cross-motions for summary judgment based on the agency record. Both the foreign producers and the domestic industry challenge the final affirmative antidumping determination of the International Trade Administration (ITA) in *Certain Fresh Cut Flowers from Colombia,* 52 Fed. Reg. 6842 (1987), as amended, 52 Fed. Reg. 8492 (1987).[1] The parties have managed to reduce the issues in this case to approximately two dozen. For the sake of brevity and because the standards of review and definitions of applicable statutory terms are well known, they will not be repeated here.[2] The court will begin by addressing the challenges of the domestic industry party, the Floral Trade Council of Davis, California (FTC or Petitioner).

I. FTC CHALLENGES

A. *United States Price Issues*

1. *Monthly Averaging*

FTC's most far-reaching challenge is to ITA's averaging of United States prices on a monthly basis. The court has approved ITA's adoption of this averaging methodology as to related flower investigations. There are no facts of record here which would alter that conclusion. *See Floral Trade Council of Davis, California* v. *United States*, 12 CIT ——, Slip Op. 88–170 (December 27, 1988) (containing complete discussion of the court's reasons for approval of monthly averaging in the related cases).

2. *U.S. Price Data of Flores Timana (Timana)*

FTC asserts that ITA did not verify certain information provided by the Colombian producer known as Timana, and therefore, ITA may not rely on data submitted by Timana. *See* 19 U.S.C. § 1677e(a)

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[1]Because of a multiple domestic industry finding by the International Trade Commission (ITC) during its injury investigation, margins were recalculated.

[2]Citations to the public record are designated "AR." Citations to the confidential record are designated "CR."

(1982 & Supp. IV 1986 which (requiring verification of data relied on by the agency and permitting use of "best information available" in the absence of such verifiable data). Specifically, FTC objects to Timana's claim that its sales for export to the United States were at certain prices, while various invoices and export licenses revealed lower U.S. prices. ITA determined, by reference to bank deposit records and accounting information obtained from Timana, that Timana's U.S. prices were as claimed by Timana.

ITA is not required to accept information contained in invoices or export licenses at face value if ITA determines, based on other evidence of record, that a different price was paid. FTC claims that the chain of evidence demonstrating the higher U.S. prices was not sufficiently linked. The court finds ITA could reasonably come to the opposite conclusion based on the data obtained by ITA, in conjunction with the plausible explanation presented by Timana as to the why the price discrepancy occurred.[3] The court finds, therefore, that Timana's U.S. price response was adequately verified, and that there was no failure of verification requiring use of other information.

3. *U.S. Price Data of Floramerica*

FTC also objects to ITA's lack of verification of sales for export to the United States made by Caribbean Flowers, a sales arm of the producer Floramerica.[4] Caribbean Flowers sold flowers produced by independent growers. ITA stated that the independent producers knew that the sales made through Caribbean were for export and merely used Caribbean as a freight forwarder. If this were the situation, the producers would have been proper respondents, assuming they had been included in the sample of producers which ITA was investigating, which they were not. *See, infra,* section II B. at 13. ITA did, however, verify Floramerica's reported volume of U.S. sales. FTC's statement that Floramerica could have hidden less than fair value (LTFV) sales by improperly denominating such sales "Caribbean Flower Sales" is mere speculation. Speculation is not support for a finding of failure to verify.

B. Foreign Market Value Issues

1. *Cost of Production or Constructed Value at Timana, Flores La Pampa (La Pampa) and Flores de Universal (Uniflor)*

a. *Cull Value at Timana and La Pampa*

ITA calculated foreign market value by using certain producers' or sellers' cost of production as constructed value where there were insufficient above cost home market or third country sales of export quality flowers. *See* 19 U.S.C. § 1677b(a)(2) and (e) (1982 & Supp. IV 1986). Apparently this situation existed with regard to all flowers at

[3]A more detailed description of the circumstances involved is found in the confidential briefs filed in this matter.

[4]"Floramerica," as used here, refers to both an amalgam of three interrelated Colombian growers, and one of the three growers.

Timana and Uniflor. 52 Fed. Reg. at 6844, 6848 (comment 36). An investigation as to whether sales of standard carnations on which foreign market value might be based were below cost of production and thus unusable was conducted as to La Pampa, among others. *See* 19 U.S.C. § 1677b(b) (1982); 52 Fed. Reg. at 6844. La Pampa's sales of standard carnations were found to be above cost of production. *Id.*

Once again, FTC alleges Timana failed verification, and that all of Timana's data must be rejected. The court finds that FTC has not demonstrated that ITA abused its discretion in using Timana's cost data, where it was available. Defects in data which are minimal do not result in failure of verification requiring use of best information available in place of all of the respondent's data. In this particular case the industry, as a general practice, does not maintain data of the type sought by ITA, thus ITA could properly use estimates as to the limited data which was unavailable.

Based on estimates, respondents were allowed a credit against cost of production for the value of substandard merchandise which was sold in the local market. The reason for selection of the particular estimates of the value of sales of substandard or "cull" merchandise for La Pampa and Timana, however, was not clearly explained, even in supplemental briefing.[5] Both Timana and La Pampa claimed little cull value, yet ITA used estimates for Timana and La Pampa which were quite high in comparison with the rates apparently assigned to some firms. In its determination, ITA asserts that it used an average of verified data if a substantially complying respondent did not provide specific data for a certain category. 53 Fed Reg. at 6845 (comment 2). As to Timana, rather than using an average of the cull values attributed to other firms, ITA used a favorable rate "in line" with that of a specific company. In its supplemental brief, ITA has not explained why it did not do what is described in the determination. Respondents lacking data should not be preferred over those fully complying with ITA's request, nor should petitioner be penalized for a respondent's lack of data. ITA may have a good reason for selecting another firm's cull value data to be used to fill in Timana's data. If so, that has not yet been explained. Unless such reason is compelling, at this stage ITA should do as it stated it had done and use average values for this information. A similar problem exists with regard to La Pampa.

b. *1986 Material Costs for Timana, La Pampa and Uniflor*

Because Timana had completed only its 1985 inventory at the time of ITA's request, no verifiable 1986 data on material costs was available. ITA allegedly allocated a material cost to the first five months of 1986 based on Timana's verified costs for the correspond-

[5]Plaintiff has made a vague allegation regarding Uniflor's cull value offset to cost. The verification report shows that a credit was calculated using, in part, a cash sale journal ledger. The final determination at Respondents' comment 39 indicates sales receipts were also used. 52 Fed. Reg. at 6852. FTC has not demonstrated that any significant error occurred. *See also, infra,* discussion of Asocolflores' challenge to Uniflor's cull value offset.

ing 1985 period. *See* 52 Fed. Reg. at 6848. In post-argument briefs, ITA admitted it mistakenly used data from a non-corresponding period to estimate 1986 costs for Timana. ITA should correct its error in such a way as to account for fluctuating yearly costs and to account for any likely increases revealed by record evidence as to other producers. For example, if 1986 costs were generally reported by other producers to be higher for the 1986 period, an estimated average increase for 1986 could be added. This would be consistent with the statement that averages would be used for missing data. FTC makes similar complaints as to La Pampa. The methodology for La Pampa should be the same as described here for Timana.

Uniflor, a seller of miniature and standard carnations, was assigned a cost of materials figure for 1986 based upon verified 1985 cost data plus Uniflor's own estimate of a percentage increase for 1986. Any unverifiable 1986 increase figure should not be used if it is lower than the average of verifiable 1986 increases over 1985 costs. To do so would be an improper use of best information available.

In general, ITA has to draw a balance when information is not made available by the respondent or is otherwise not verifiable. ITA leaned one way when it decided to accept *some* data from the respondents. As indicated, this was reasonable as ITA justifiably found substantial compliance. In order to achieve a fair balance, however, ITA has to lean back the other way somewhat to avoid improperly favoring respondents as to the missing information. ITA can reach the balance in several ways. In this case, it claimed it would use an average of data from other sources. This would appear to be one acceptable choice for substantially complying respondents. In other cases, ITA may have reason to use data less favorable to respondents. This could be particularly true where ITA is uncertain as to whether a respondent could have provided the missing data. What ITA should not do is assign particularly favorable data to respondents if more neutral data is available.

2. *Capitalization of Propagation Costs*

FTC objects that ITA erred in calculating cost of production by relying on current expense data regarding propagation costs at Floramerica. According to FTC, such method inadequately accounted for propagation costs incurred in earlier years for the flowers sold in the review period. Floramerica did not capitalize its costs, but ITA in making its calculations assumed that propagation costs were continuous so that utilization of current expense data would approximate the results of capitalization.

Apparently, the major source of disagreement between ITA and FTC involves carnation production[6] because carnations have a life span of two years. FTC argues that ITA did not know if the current

[6]Foreign market value for sales of standard carnations by Floramerica was calculated based on third country prices, but costs remains relevant because of plaintiff's assertion that substantial sales were at less than cost. This would require, under certain conditions, the use of cost based constructed value for foreign value calculation purposes. *See* 19 U.S.C. § 1677b(b) (1982).

expense data was usable because ITA failed to determine if all plants were replaced every two years or whether half were replaced every year. ITA states that despite the time periods needed for the plants to become useful, production was stable. FTC counters that disease or weather could have caused production not to increase.[7] This is mere speculation. Reasonable business practice would require planting that resulted in stable production on a yearly basis. The record showed that production was stable. The court finds that ITA did take a somewhat broad approach on this issue but its conclusion is sufficiently supported.

3. *Interest Credit at Flores Esmeralda*

FTC objects that ITA improperly allowed Flores Esmeralda a short term interest credit in its cost calculation. FTC argues that ITA did not ascertain whether the interest earned was actually derived from current cash flow. Neither ITA's determination nor defendant's supplemental brief with regard to interest income was sufficient to explain why ITA states that the substantial figure for interest income accepted as a credit was actually based on interest arising from current operations. No citation to evidence of record was made indicating that the interest was earned on a "temporary short term investment related to current company operations." Defendant's Supplemental Brief at 4. Thus, the court cannot determine whether, in this case, the investment income which was netted against interest expense was related to current operations. Defendant also failed to provide as requested a general explanation as to if, or in what circumstances, interest credits and expenses are netted rather than allowing interest income as an offset up to the amount of interest expense. None of the past administrative cases cited by the parties on this point is clear as to past practice. The statements in *Erasable Programmable Read Only Memories (EPROMs) from Japan*, 51 Fed. Reg. 39,680, 39,684 (Oct. 30, 1986), cited by defendant is particularly confusing. The rationale and factual basis for ITA's determination on this issue have yet to be revealed.

4. *Adjustment of Constructed Value for Differences Between Selling Expenses in the Home Market and in the U.S. Market*

In its determination, ITA applied 19 C.F.R. § 353.15 (1988) to reach a fair comparison between U.S. and home market sales by deducting from constructed value specific United States selling expenses. This methodology has been found to be reasonable and necessary under 19 U.S.C. § 1677b(a)(4) (1982 & Supp. IV 1986). *See The Timken Co.* v. *United States*, 11 CIT——, 673 F. Supp. 495, 507–8 (1987). Constructed value is one way of arriving at foreign market value. According to *Timken*, once basic foreign market value has been calculated by any method, that is, home market sales, third

[7]Evidence of record indicates that Floramerica did not have disease problems and also had substantial propagation costs in the years of concern.

country sales, or constructed value, it should be adjusted for differences between conditions in the home market or in the surrogate market and conditions in the United States, in order to achieve a fair comparison. This court has been presented no convincing reason why *Timken* should not be followed.[8]

The court will next address the challenges of the various foreign producers. The lead plaintiff in these consolidated actions is known as Asocolflores. It is a trade association. Although FTC is also a plaintiff in this consolidated action, the court will refer to the various producers or exporters generally as "plaintiffs" or "Asocolflores."

II. ASOCOLFLORES' CHALLENGES

A. Scope of the Antidumping Laws

Asocolflores makes a general argument that the fresh-cut flower industry operates in such a manner that any dumping is in essence "technical," and that Congress did not intend for duties to be imposed in such a situation. Asocolflores' arguments lead the court to conclude that four factors are to be considered: the cyclical nature of the industry, the perishability of the merchandise, the lack of a developed home market, and the consignment basis of many of the U.S. sales at issue.

In response to plaintiffs' arguments regarding cyclical value and perishability, the court finds that ITA made ample effort to adjust its computations to account for the yearly cycle and the perishability of the merchandise at issue. *See* discussion of averaging in *Floral Trade Council of Davis, California* v. *United States*, 12 CIT ——, Slip Op. 88–170 (Dec. 27, 1988). ITA's approach was broad enough to eliminate, to a reasonable degree, the potential that an investigation of this industry would result unfairly in an affirmative finding because of "necessary" low priced sales.[9]

In response to Asocolflores' comments regarding the lack of a "genuine home market," the court finds that Congress specifically provided a method for dealing with lack of home market sales in 19 U.S.C. § 1677b(a) (1982 & Supp. IV 1986). Thus, Congress' intent appears to be that the antidumping laws should apply in such circumstances as these.

Lastly, Asocolflores notes the existence of consignment sales, the prices of which are not directly controlled by the producers. The argument is that in view of the other factors and this lack of control, it is clear that the producers do not intend to dump their merchandise. The antidumping laws, however, do not make producers' intent determinative. *See USX* v. *United States*, 12 CIT——, 682 F. Supp. 60, 68 (1988). Furthermore, all U.S. sales, whether made pur-

[8]The court does not reach the issue of whether an adjustment which brings the general expense aspect of constructed value below the statutory minimum as set forth in 19 U.S.C. § 1677b(e) is permissible as plaintiff did not demonstrate that this occurred here. *But see Timken*, which appears to approve the full circumstances of sale adjustment. 673 F. Supp. at 508 n.21.

[9]The court finds without merit Asocolflores' argument that monthly averaging on a per consignee, as opposed to a per producer or exporter, basis, undermines the rationale for ITA's approach.

suant to consignment agreements, fixed priced contracts or otherwise, except for certain inapplicable exceptions, are to be included in margin calculations[10] This enables the full effect of unfair pricing to be counteracted. Producers are not entitled to an exemption from the antidumping laws merely because they put pricing outside their direct control. Whether the factors discussed here are considered together or separately, plaintiffs are not entitled to an overall negative determination.

B. Sampling.

Asocolflores alleges that ITA's sampling techniques were defective. During the administrative proceedings, Asocolflores suggested a list of eighteen producers which it believed should be investigated. These producers were responsible for sixty percent of imports. Investigation of the eighteen largest producers would have reflected ITA's traditional method of investigation. *See* 19 C.F.R. § 353.38(a) (1988). In this case, however, ITA decided that sampling was required because of the large number of transactions involved, but more importantly, because the Colombian industry was composed of numerous small producers. Sampling is specifically authorized by 19 U.S.C. § 1677f–1(a) (Supp. IV 1986). The parties do not dispute that the first statutory requirement was met, that is, that sampling be used only if a significant number of transactions (or adjustments) are involved. *Id.* The second requirement under the statute is that the type of sampling employed yield representative results. *See* § 1677f–1(b). This is the subject of dispute.

In the case of an industry composed of numerous small producers some type of random sampling may be the preferred approach. *Cf. Fabricas El Carman, S.A.* v. *United States*, 11 CIT——, 672 F. Supp. 1465, 1479 n.25 (1987) remand order vacated as moot 12 CIT——, 680 F. Supp. 875 (1988). (Fabricas is distinguishable because it involves country-wide countervailing duty rates; the court, however, expressed concern about ITA's traditional methodology for industries composed of numerous small firms, which methodology the court viewed as a type of non-random sampling. ITA's sample in the case at hand resulted in the investigation of one large exporter and about eleven smaller ones.[1] This is approximately the ratio of large to small firms in Colombia, overall. Furthermore, each flower type involved in the investigation was covered by the sample.

Asocolflores' main complaints seem to be that too few large exporters were included in the sample and that a stratified sampling

[10]Note that the definition of exporter, applicable to exporters' sales price transactions for U.S. price purposes, which is found in 19 U.S.C. § 1677(13) (1982) refers to agents of producers. That this term includes consignment agents is confirmed by the legislative history of the Antidumping Act of 1921. *See* Hearing on H.R. 2435 before the Senate Finance Committee, 67th Cong., 1st Sess. at 42–43 (1921).

[11]Other producers volunteered for investigation, but were not included in the sample for purposes of calculating an "all other rate." ITA properly refused to add to or subtract from the sample for purposes of constructing an all other rate. ITA properly included in its all other rate best information rates for companies selected for the sample who did not respond to questionnaires. Respondents must answer; ITA must be in a position to judge who is properly covered by the investigation. Respondents may not make that choice. In a random sampling situation, to exclude such non-responding companies from the all other rate would undermine the overall methodology. This case is distinguishable from non-random sampling cases on this point.

technique should have been employed.[12] Plaintiffs requested stratification according to the size of the producer, but some of their arguments imply that stratification by type of flower produced is also sought. Plaintiffs' desire for one or more types of stratified sampling is not a sufficient basis for objection to ITA's methodology. ITA performed an acceptable random sample. A stratified sample is merely a special type of random sample which may be constructed when the investigator has a degree of prior knowledge about the universe to be sampled. J. Freund, *Modern Elementary Statistics* 217 (5th Ed. 1979). There is no requirement that a stratified sample be used, particularly when it would require ITA to conduct a substantial pre-investigation.

Asocolflores also argues that a report by economists which it hired demonstrates that certain producers included in the sample were not representative of the group. Costs are alleged to be adnormally high or other factors are said to make the firms unsuitable for inclusion in the sample. Perhaps if ITA had unlimited time it would have chosen a broader sample or would have kept resampling until its selection satisfied even the most stringent standards. ITA, however, has very limited time in which to conduct its investigations. None of the characteristics attributed to the producers which Asocolflores wishes eliminated seem out of the ordinary for an agricultural industry composed of numerous small producers and some large ones. Furthermore, one small producer with high costs does not seriously skew the sample to plaintiffs' detriment when a weighted margin is used. In such a case, the loan rate attributed to the large producer, or producers, dominates.

In addition, the court finds no disruption to the sample merely because of required recalculations following ITC's determination. In hindsight, it would have been better had ITA stratified per flower type because of ITC's, multiple industry finding based on flower type. ITA, however, cannot be held to foresee what ITC's decisions will be. ITC's determinations address different questions and are based on different standards. ITA's sample was not perfectly suited to the final shape of the order, but the sampling methodology was legally adequate and the results of the sampling have not been shown to be unrepresentative.

C. Foreign Market Value Issues

1. *Floramerica's Claim to an Exporter's Sales Price Offset*

Floramerica claims that its indirect selling expenses in the home market should offset the deduction to exporter's sales price (ESP) for selling expenses in the United States.[13] 19 C.F.R. § 353.15(c) (1988) permits such an offset. *See also Smith-Corona Group* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983). In order to obtain the off-

[12]Plaintiffs' other suggestion of a sampling of *sales*, as opposed to producers, is not feasible. ITA's investigations focus on producers. Sampling of sales in this case would lead to a burdensome number of verifications because the number of producers involved would not be reduced significantly.

[13]*See* 19 U.S.C. § 1677a(a) and (c) (1982) for definition of United States Price and Exporter's Sales Price. *See also* 19 U.S.C. § 1677(13) (1982) (defining the term "exporter" for the purpose of determining United States value).

set the claimant must document actual selling expenses in the home market.

As indicated, Floramerica is actually three interrelated Colombian companies - Floramerica, Jardines de Colombia and Cultivas del Caribe Company x is a related Pamamanian company which acts as a distributor for the Colombian Floramerica companies. Other related sales entities are Sunburst Farms, Inc. of Miami, Florida and Sun Petals, both of which market flowers in North America, and Sunburst Holland, which markets flowers in Germany. Sales to Sunburst Miami are made through Company X which purchases the Colombian flowers on a fixed price basis. Sunburst Holland makes sales and then places orders with the Floramerican Colombian companies which then distributes them through Company X to Sunburst Holland.

Asocolflores' complaint is that ITA allowed an offset for selling expenses incurred by the two Sunburst companies but neglected the offset for Company X's expenses which had been included in the reduction to ESP. It appears clear from the submissions that had ITA known, at the time it made its determination, all of the facts that are now so clearly described, that it would have granted a larger offset than it did.

To the court, the question is whether ITA acted reasonably in relying on certain statements of the respondent when it made its foreign market value calculation excluding when it made its foreign market value calculation excluding X's expenses. If ITA acted reasonably, the court will not force a recalculation. To do so under such conditions would undermine the finality of these determinations. As much as the court would like determinations to reflect reality, those determinations should not be judged on the basis of later acquired information about reality. This would be akin to deciding a case on matters outside the record.

A review of the history of the investigation vis-a-vis Floramerica is necessary to an understanding of this matter. Floramerica's first questionnaire response on September 10, 1986 contained very little useful information from which to calculate an ESP offset. *See* AR 65 and CR 19. Totals for selling expenses are included but descriptive information is not. Deficiencies in questionnaire responses are not unexpected. ITA normally sends a deficiency letter in such situations in order to clarify its request. It did so here. *See* AR 79. Following Floramerica's October 10, 1988 submission (CR 23), on October 24, 1986, ITA again sent a deficiency letter specifically noting that indirect selling expense data was missing. AR 109. On October 28, 1986, a supplemental response was submitted which merely references the numerical data in the September response. On October 31, 1986, ITA sent another letter indicating that cost data per sales unit was unit was not supplied. Verification occurred during November and December, 1986, at which time further submissions were requested of Floramerica. On December 31, 1986, Floramerica

amended its September 10, 1986 submission and provided cost figures for both the Sunburst companies and Company X. C.R. 102. Although the data sheets do not describe the components of indirect selling expenses for the various U.S. and third country sales directly, the implication of the cost sheets is that two-tier distribution expenses are involved in all relevant sales.

The third questionnaire response of Floramerica was submitted on February 5, 1987. CR 88. This was the first time that Floramerica submitted a specific textual explanation of its indirect selling expense data along with specific figures.[14] The textual explanation of the numbers, however, seemed more clear than it actually was. As to the U.S. side of the equation, Floramerica's explanation of the figures was that the "selling expense adjustment has been limited to the costs *incurred by Sunburst Farms and Sun Petals* in making sales in the United States" (emphasis added) CR 88 at 4. Floramerica also referred ITA to Attachment 17 of its December 31, 1986 submission. (This was a correction to the earlier Attachment 17 to the September 10, 1986 submission (CR 19).) The statement continues:

> A comparable figure has been calculated with respect to indirect selling expenses incurred by the Floramerica Group, including Sunburst Holland, in selling to Germany. Indirect selling expenses incurred by Sunburst Farms in selling to Canada are the same as the costs incurred in connection with U.S. sales.

CR 88 at 4.

ITA took the specific statement with regard to the expenses listed in Attachment 17 as to U.S. sales literally. It assumed correctly that the Panamanian distributor's expenses were missing and added them to the ESP deduction. The next step is where ITA erred. It passed over the statements that the third country expense data was "comparable" or "the same," and did not add the Panamanian distribution costs to the offset to the ESP deduction. The examiner focused instead on the statements indicating that the U.S. sales figures included only expenses *incurred by* the U.S. entities, and that the third country sales figures included all the selling expenses of the *Floramerica Group,* including the European distributor. This last phrase implies that the concept "Floramerica Group" included all of Floramerica's distributors. Furthermore, one cannot merely compare the U.S. and Canadian data in CR 88 and see that the indirect selling expenses are the same as to both the U.S. and Canadian sales, that is, that certain expenses are missing from both, because German sales are aggregated with the Canadian sales. Floramerica apparently was requested to present its information in that manner.

Given that ITA had the information readily available (it used it to make deductions on the U.S. price side), and that to the extent it

[14] The similar textual explanation at page 96 of Asocolflores' pre-hearing brief is unconnected to specific figures.

forcused on the issue, ITA probably intended to grant the full offset, this matter comes down to placing responsibility for what is a simple error.

On one hand, ITA could have been more diligent in recognizing the inconsistency between the February 5, 1987 statements of data comparability and its own conclusion that Panamanian expenses were missing on only one side of the comparison. On the other hand, Floramerica could have avoided the confusion by clearly indicating Panamanian expenses were not included. In this regard, the parties were equal in their lack of attentiveness.[15]

The deciding factor here is that this was a last minute submission — Floramerica's last chance to explain itself after failing on numerous occasions to present its numerical data properly and to relate it to a coherent textual explanation. ITA could not be expected on February 5, 1987, to make the same inquiries it would have made on September 10, 1986, or during verification. This information was provided post-verification. At that point there is no room for lack of clarity by the only party apparently in a position to explain its own data, Floramerica.

The court realizes it is perpetuating an "error," but if these investigations are to be successful, parties must submit data promptly, and be very clear as to what the data indicates. The court also notes the numerous other errors and discrepancies which led petitioner to allege failure of verification by Floramerica. Just as the court found ITA did not abuse its discretion in finding a successful verification, the court finds ITA did not abuse its discretion in refusing to recalculate the margin when the error made by ITA is attributable to plaintiffs' late submission of ambiguous information.

2. *Use of Third Country Prices in General*

Asocolflores alleges that third country prices are unfairly used as surrogates for home market prices, in place of constructed value, for two reasons. One, it alleges that the third country product mix is composed of higher quality flowers than are sold in the United States. Two, it alleges that European sales are made on a fixed priced basis, while U.S. sales are made on a consignment basis.

These statements are either overboard or unsubstantiated. No citation to the record regarding the quality of the flowers sold in Europe or Canada is given. Some U.S. sales are made on a fixed price basis. No claim is made that all Canadian sales are made on a fixed price basis. Asocolflores ignores the fact that the act is designed to compensate for dumping, however it materializes, and the fact that ITA made ample adjustment for selling conditions in the United States versus those in third countries. If properly adjusted, third party sales may be utilized by ITA to make a fair comparison.

[15]This case is distinguishable from *Far East Machinery Co., Inc.* v. *United States*, 12 CIT——, 688 F. Supp. 610 (1988) in which the court ordered a remand to enable ITA to consider documentation which was submitted late in a proceeding. Unlike the *Far East* case, in this case ITA's requests were not misleading and there were no shifts by ITA in defining the standards applicable to the issue. Furthermore, in *Far East* at least one party spelled out clearly exactly what the numbers of concern indicated. That did not happen here.

3. *Use of Both Constructed Value and Third Country Sales for Foreign Market Value*

Asocolflores also argues that ITA was required to use either constructed value or third country prices where no adequate home market sales existed, but that it could not use both methods for one producer. The court can find absolutely nothing in the statute or legislative history which forbids ITA's practice in this regard. *See generally,* 19 U.S.C. § 1677b(a).[16]

ITA is not required to eliminate third country prices as a possible surrogate for home market price before restoring to constructed value. This statutory flexibility is intended to assist ITA by lessening its administrative burdens. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 95–96 (1979). The stature, however, does not mandate use of only constructed value for a particular producer when ITA is able to use third country prices for certain periods but not for others. The statute favors use of actual prices where appropriate. *Id.*

4. *Exclusion of Certain Flores Del Rio (Del Rio) Sales in Calculating Third Country Price*

Asocolflores asserts that certain Del Rio sales should be omitted from the foreign market value calculation. Presumably this would result in use of constructed value because of inadequate third country sales. *See* 19 U.S.C. § 1677b(a). As indicated, actual prices are preferred if they may be used appropriately. The only reason offered for exclusion of the sales at issue is that they are alleged to be sales for export to the United States as opposed to the third country. The orders, though received from the U.S. distributor, were for direct shipment to Canada. The contractual arrangements are the same for U.S. and Canadian customers. That the reseller remits payment to Del Rio does not change the result that the merchandise was sold for export to Canada. The sales should not be excluded.

5. *Cost of Production, Treatment of Culls*

a. *Allocation of Production Costs to Culls*

As did the producers, ITA treated certain non-export quality flowers as "culls." Culls were often disposed of as waste, or if saleable, were sold for low prices in the local market. ITA's treatment of non-export quality flowers as a by-product was supported by substantial evidence. The record indicates that cull value was relatively low and that production of culls is unavoidable.[17] These both have been recognized by ITA in the past as indicia of by-product status. *See* discussion in *Ipsco, Inc.* v. *United States,* 12 CIT——, 687 F. Supp. 633, 636–7 (1988). Nothing in the record indicates that other factors

[16] Any use of the disjunctive in the legislative history, that is, constructed value *or* third country prices, is unrelated to the concept of "per producer."

[17] Plaintiffs do not support their statement that some "second quality" flowers were of a value approaching that of export quality flowers. As far as the court understands ITA's methodology, costs are allocated over all "export quality" flowers; this does not include seconds, splits or culls. ITA maintained consistency by excluding, where possible, any such sales on the U.S. price side of the comparison.

should have altered the outcome here. Cull value, if determinable, should be deducted from cost of production and production costs should not be allocated to culls. *Id.* ITA's methodology is sustained in this regard.

b. *Uniflor's Cull Credit*

Asocolflores, somewhat contradictorily, alleges the Uniflor's cull value offset to producer cost was too low because ITA only allowed the offset when it could relate cash journal entries to receipts. It is within ITA's discretion not to accept cash journal entries as sufficient verification.[18]

D. U.S. Price Issues

1. *U.S. Price Deduction for Customer Credits*

19 U.S.C. § 1677a(d) (1982) requires that United States Price be reduced for expenses incident to bringing the merchandise from the place of shipment to the place of sale in the United States, if such expenses are included in the price in the United States. Credit returns were shown to be a standard U.S. selling practice which were covered in various sales agreements. The credits were treated by the consignees as reducing gross sales value. ITA states that, therefore, it compiled with the statute by reducing U.S. price to reflect credit returns. (ITA does not say which producers are affected by this).[19] ITA does indicate that for one respondent, La Pampa, it reduced U.S. price to account for such credits but that it did *not* reduce the number of units sold, for U.S. price purposes, because necessary unit data was missing. *See* 52 Fed. Reg. at 6850 (comment 21). This indicates that ITC likely would have reduced total units sold by the number of units of returned unsalable merchandise if it had such data. It does not appear that La Pampa provided such data *Id.*

In the case of consignment sales, the effects of sales of flowers which deteriorate after shipment but remain saleable have already been accounted for, at least partially, through ITA's U.S. price averaging techniques. Furthermore, certain U.S. sales of deteriorated merchandise were excluded from the U.S. price calculation. *See* 52 Fed. Reg. at 6852 (comment 40). Any actual returns, i.e., non-sales, should have been documented in order for the number of units to be reduced along with the credit return deduction. Plaintiffs have not demonstrated error by ITA in this regard.

2. *Non-payment by Uniflor's Customers*

Asocolflores argues that sales that were made with the expectation of prompt payment but for which payment was never received because of the customer's bankruptcy should be excluded in calculating U.S. price. ITA treated the sales at issue as sales at invoice

[18] Asocolflores indicates at p. 77 of its brief that the cull offsets which were allowed were allocated improperly. Defendants did not address this. This item should be explained or corrected on remand.

[19] Plaintiffs do not adequately support their general argument that no reduction for credit returns should be made at all. *See 52 Fed. Reg. at 6850 (comment 9).*

value minus a credit expense at a very high interest rate for a period of more than one year.

Defendant did not respond to Asocolflores' argument. Nor is ITA's final determination illuminating on this point. There is no evidence that these sales in any way reflect Uniflor's normal credit practices. Furthermore, ITA's past methodology in this regard is superficially inconsistent. *Compare Neoprene Laminate from Japan*, 52 Fed. Reg. 36,295 (1987) (final antidumping determination finding non-payment sale includable at contract price after adjustment for imputed credit expense) *with Neoprene Laminate from Taiwan*, 52 Fed. Reg. 37,193, 37,194 (1987) (final antidumping determination finding such sales excludable as unrepresentative).

FTC made several arguments, including an analogy to the integrity of the sample.[20] It is one thing to include producers in a sample; whether they are typical or atypical is difficult to judge. Once the producer is included, however, all of its sales need not be included in order to maintain sample integrity. ITA must make a determination as to which sales of the included producer are so unrepresentative as to be unfairly distorting. *See Sonco Steel Tube Div.* v. *United States,* 12 CIT——, 694 F. Supp. 959, 962 (1988). ITA made many similar choices through-out this investigation. It must make this one as well, and explain it.

E. Uniflor's Rate as Best Information Otherwise Available

Plaintiffs allege that Uniflor's rate should not have been utilized as best information available for the non-responding companies because its experience as a small exporter is atypical. Plaintiffs have not demonstrated that Uniflor's experience is atypical of the class of all producers and exporters in any relevant way. ITA's standard practice is to use the highest rate available as best information available in the face of substantial non-compliance. "Best information available" is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information. *See Pistachio Group* v. *United States,* 11 CIT——671 F. Supp. 31 (1987). Uniflor's rate was an acceptable rate to use for "best information otherwise available" purposes. 19 U.S.C. § 1677e(b) (1982).

Conclusion

ITA's overall approach to this investigation is found to be within the bounds circumscribed by the statutory scheme. This matter must be remanded, however, for correction of certain clerical errors noted by the parties. In addition, the court requires further explanation and/or reconsideration of ITA's conclusion as to Flores Esmeralda's interest credit (*supra* at 9–10); material costs for Timana, La Pampa and Uniflor (*supra* at 6–8); cull value offsets for Timana, La Pampa (*supra* at 4–6) and Uniflor (*supra* at 25 n.18); and the

[20] FTC's other arguments on this issue are overstated. Specifically, a zero U.S. sales price would not be appropriate.

treatment of Uniflor's U.S. sales for which payment was not received (*supra* at 27–28). ITA is to submit its remand determination within 30 days. Any party wishing to comment thereon shall do so within 10 days thereof. Responses shall be filed 5 days thereafter.

(Slip Op. 89–4)

FLOREX, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, DEFENDANT-INTERVENOR

Court No. 87–05–00686

Before RESTINI, *Judge.*

[Judgment for defendants.]

(Decided January 6, 1988)

Duncan, Allen and Talmage (*Leslie Alan Glick*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch (*Elizabeth C. Seastrum*), Civil Division, United States Department of Justice; *Duane W. Layton,* Office of the Chief Counsel for Import Administration, United States Department of Commerce; *Judith M. Czako,* Office of General Counsel, United States International Trade Commission, for defendant.

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.,* and *Jimmie V. Reyna*) for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on plaintiffs' motion for judgment on the agency record. At issue are the final determinations of the International Trade Administration of the Department of Commerce (ITA) and the International Trade Commission (ITC) involving fresh cut flowers from Mexico. Plaintiffs are various producers in Mexico who were respondents in the agency investigations. The court will first address the issues arising out of the final affirmative ITA determination in *Certain Fresh Cut Flowers from Mexico,* 52 Fed. Reg. 6361 (March 3, 1987).

A. *ITA Issues*

1. *Standing*

a. *Interested Party*

Plaintiffs challenge the ITA's determination that Floral Trade Council of Davis (FTC) is both an interested party and represents the relevant domestic fresh cut flower industry. 19 U.S.C. § 1673a(b)(1) (Supp. IV 1986) reads as follows:

(b) Initiation by petition

(1) Petition requirements

> An antidumping proceeding shall be commenced whenever an interested party described in subparagraph (C), (D), (E), or (F) of section 1677(9) of this title files a petition with the administering authority, on behalf of an industry which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations. The petition may be amended at such time, and upon such conditions, as the administering authority and the Commission may permit.[1]

As to the first requirement, that the petitioner be an interested party, plaintiffs assert the petitioner did not allege in its petition facts sufficient to establish that it qualifies as an interested party under section 1677(9)(E) or (F), that is, that it is a trade association, a majority of whose members produce or wholesale the fresh cut flowers under investigation. FTC is a trade association. In its petition, FTC alleged that a majority of its members produced a product like that subject to investigation. Thus, FTC made the necessary allegations. At the petition sufficiency stage, ITA proceedings are *ex parte.* It is inappropriate to accept submissions by respondents at this stage. *See United States* v. *Roses, Inc.,* 706 F.2d 1563 (Fed. Cir. 1983).[2] Finding no reason to doubt the correctness of the allegations made by petitioners at the initial stage, ITA accepted FTC's representations as to its status as an interested party.

During the proceedings, respondents challenged the allegations of FTC. All parties agree that standing may be challenged subsequent to the initial *ex parte* stage of the proceedings. At a hearing before ITA, FTC alleged that 100% of its members grow fresh cut flowers. Plaintiffs now state that FTC has never alleged that this 100%, or even the statutorily required majority, produces or wholesales at least one of the seven cut flowers subject to the simultaneous flower investigations or the three flowers involved with regard to Mexico. In fact, FTC alleged at the hearing before ITA that ITC had information on a flower-by-flower basis, which information would illuminate the issue of FTC's relation to the totality of growers. Such information might also indicate which of FTC's members grew the particular flowers at issue, or FTC could have provided such information if ITA had considered this a serious issue. Although respondents mentioned the need for further investigation as to this issue

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[1] 19 U.S.C. § 1677(9) (1982 & Supp. IV 1986) reads in pertinent part:

(C) a manufacturer, producer, or wholesaler in the United States of a like product,

(D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product,

(E) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States, and

(F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a like product.

[2] It is unnecessary in this case to reach a decision as to whether ITA may accept submissions by domestic interests regarding standing at this stage as none were offered. The court notes that in *Citrosuco Paulista, S.A.* v. *United States,* 12 CIT ——, Slip Op. 88–176 (Dec. 30, 1988), some of the "domestic" parties attempting to submit information at the early stage were comprised of some importing interests. Activities during the first stage did not appear to be a focal issue of that case, *see* Slip Op. 88–176 at 17, and it is not of great concern here.

in their prehearing brief, Public Record Document Number (PR) 105 at 2, in their post-hearing brief, plaintiffs did not cite to any particular information on this issue or request ITA to review data from ITC on this subject.[3] Thus, it would not have been clear to the agency whether plaintiffs were adhering to their objections in the face of FTC's statements at the hearing.

It is at least a theoretical possibility, based on the record before the ITA, that less than a majority of the members of FTC produce or wholesale one or more of the flowers under investigation. But this case may only be judged on the record before the court. No evidence was produced indicating the FTC was not an interested party and certainly no members of the domestic industry opposed the petition on this, or any other ground. The only relief available would be to remand on the basis of inadequacy of investigation. It would seem inappropriate under the circumstances of this investigation, including the manner in which plaintiffs presented this argument, to remand this action to the agency to investigate the speculation of respondent in an effort to determine if a technical defect exists as to petitioner's standing. Any such defect likely was easily amendable.[4]

Clearly, the standing provision is intended to protect the domestic industry and to save ITA the effort of investigating unsupported petitions.[5] Presumably respondents also are not meant to be harassed by frivolous petitions, but without some evidence of record suggesting that FTC is not an interested party, or that ITA clearly erred by failing to investigate further, the statutory purposes of the standing provisions would not be served by remand for investigation of this point. ITA's position that it was not required to undertake further investigation on this issue seems well taken based on the facts of this particular case. The agency is not required to investigate every possibility. Furthermore, *Citrosuco Paulista, S.A.* v. *United States,* 12 CIT ——, Slip Op. 88–176 at 15 (Dec. 30, 1988) indicates that interested party problems do not, in every case, require a new petition and investigation, because ITA may commence proceedings *sua sponte.* What limits may exist as to ITA's discretion in this area need not be addressed here because of the factors discussed *supra* and those mentioned in the following section. The record in this case does not indicate lack of standing on this basis. Based on the facts of this case, there is no adequate reason for remand for further investigation of this issue.

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[3] In their briefs before the court plaintiffs refer to certain ITC information. Plaintiffs neither put that information before ITA nor asked ITA to review it. Thus, ITC's information is not part of the record for the purpose of review of ITA's decision. The confidentiality of the information would not seem to bar ITC's provision of a synopsis or expurgated version to ITA or plaintiff. It was plaintiffs' burden to pursue this in view of the allegations made by FTC, and the apparent lack of industry opposition.

[4] ITA may accept an amendment to the petition without commencing a new investigation. *Citrosuco Paulista, S.A.* v. *United States,* 12 CIT ——, Slip Op. 88–176 at 14–15 (Dec. 30, 1988). If this issue had been shown to be a genuine problem, the petition might have been amended to be a petition by those members of FTC which produced the relevant flowers. Plaintiffs make no allegation that none of the 92 signers produced the relevant flowers.

[5] S. Rep. No. 249, 96th Cong., 1st Sess. 63, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381,449 states:

> The committee intends that the standing requirements be administered to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation.

b. *Representation of the Domestic Industry*

Plaintiffs also allege that FTC did not act "on behalf" of the domestic industry because only 92 of its members signed the petition filed herein and because these 92 members represent a small part of the cut flower industry. FTC is composed of 260 growers of fresh cut flowers. There are alleged to be from 500 to several thousand commercial growers of fresh cut flowers in the United States.[6]

The fact that only 92 FTC members signed the petition does not indicate that other members of the industry do not support the petition. ITA's position is that it need not look beyond the petition as to this element of standing unless information is produced indicating that the domestic industry does not support the petition. Representativeness is not defined by the statute. Unfair trade proceedings are very expensive, thus, they are often brought by trade associations as opposed to individuals. Individuals may file petitions. The filing of a petition by a trade association, however, is normally some indication, in itself, of industry support. Certainly it is unlikely that FTC would file a petition if the majority of its members opposed it. Based on the ITA record, a majority of FTC's membership would seem to constitute a large fraction of the domestic flower industry, if one views the industry on a grower by grower basis. In addition, ITA did not receive one U.S. industry submission indicating opposition to the petition. Thus, ITA appears to have acted reasonably in accepting the petition as representative of the industry's view and in adhering to that position.

The one case cited by plaintiffs on this point is inapposite. *Gilmore Steel Corp.* v. *United States,* 7 CIT 219, 585 F. Supp. 670 (1984) involved the issue of whether ITA *may* terminate an investigation when industry opposition indicates the petition is not being prosecuted on behalf of the industry. In *Gilmore,* the court indicated that in the face of such manifest opposition the investigation could be terminated as to the concerned national industry. The case was remanded, however, for a decision on whether the petitioner represented a regional industry.[7] Absolutely none of this indicates that ITA's view, that it *may* accept the petitioner's allegations as to its representation of industry views until industry lack of support is demonstrated, is erroneous.

c. *Action by ITC*

The court finds no indication that ITC erred in finding FTC had standing. Plaintiffs raised the issue in their reply brief before this court of whether ITC should have found lack of representativeness because plaintiffs deduced from information before ITC that FTC represents a small portion of the producers of the three flowers

[6]The higher figures have not been shown to relate to cut flower growers exclusively and seem for the most part to be from ITC not ITA records.

[7]Recently in *Oregon Steel Mills, Inc.* v *United States,* Nos. 88–1243 (Fed. Cir. Nov. 23, 1988), the Court of Appeals held that ITA *could* invoke an antidumping order as a corollary to voluntary restraint agreement implementation where Gilmore and another company were the only companies opposing revocation. In that case, a majority of the U.S. steel producers voiced their lack of support for the continuation of antidumping duty proceeding by writing to the ITA. No such action occurred here. *See Citrosuco* at 19 (distinguishing *Oregon Steel* and *Gilmore*).

from Mexico subject to investigation. ITC seems to defer in most matters to ITA, on the issue of standing. At least, in the first instance, ITA should make the ruling on standing as part of its petition sufficiency determination. Had ITC's investigation raised indications of lack of industry support, it might be appropriate to pursue the issue of the proper roles of ITA and ITC on this issue. Such indications of lack of support are missing, however. Furthermore, plaintiffs have not alleged that they pursued this issue at ITC after the information they rely on here surfaced. In any case, none of plaintiffs' arguments overcomes the numerous other indications of industry support found in the record of both agency proceedings.

2. *Use of Best Information Available for Plaintiff Visaflor*

Plaintiff Visaflor does not dispute that its submission contained numerous errors and omissions including errors in U.S. sales price data and omission of at least one U.S. sale. Omitted U.S. sales are considered a serious error by ITA. ITA cannot discover such errors until verification. Capture of all U.S. sales at their actual price is at the heart of ITA's investigation. Furthermore, the record reveals that nearly half of all home market sales examined by Commerce inaccurately reported price, quantify or grade. ITA also discovered at verification that respondent sold other flower types than indicated in its response. The questionnaire response was replete with other errors. In such a situation ITA is justified in finding a failure of verification. Such a finding is essentially the same as a finding of failure to respond at all. In fact, it may be worse because ITA had to expend time at verification to discover the errors made in the response. Pursuant to 19 U.S.C. § 1677e (1982 & Supp. IV 1986), in both situations ITA must use best information available in order to conclude its investigation.

Visaflor argues ITA did not use the best information available. Visaflor claims that the proxy margin rate selected was that of a company with much different conditions of operation, such that its margin cannot be considered the best information available as to Visaflor. It is ITA's standard practice to assign the highest margin determined for any of the respondents to non-responding, or verification failing, producers. This methodology is an attempt to avoid rewarding producers for failure to respond or to present verifiable information. One cannot be certain it always accomplishes the purpose because the respondents's margin theoretically could have been higher than the assigned margin, but in most cases use of the highest rate determined will accomplish the intended purpose.

Visaflor's request that rates attributable to a more similarly situated company be used is really a request that some information about Visaflor be used. Visaflor failed verification; it is not entitled to a detailed comparison of its activities with those of potential substitutes so that ITA can obtain the closest match. There is simply no guarantee that the rate attributable to the company which ap-

pears most similar would be the rate which Visaflor would merit had it responded properly.

Assuming *arguendo* that Visaflor is correct to the extent that it claims that it must be given the rate of uniquely similar companies as opposed to one which is totally unfit for comparision, Visaflor has not demonstrated that the fit is so exact for one or two other companies and so bad for the company selected by ITA that ITA's choice must be rejected. ITA's decision that the best rate available is the highest rate available is not unreasonable in this case.

3. *Treatment of Consignment Sales*

a. *Inclusion of Consignment Sales in Calculation of U.S. Price*

At oral argument plaintiffs withdrew their argument that inclusion of below cost sales in the monthly average of U.S. price is error.[8]Assuming *arguendo* that the related argument, that consignment sales should not be included, remains, it has not been found meritorious. *See Association de Colombiana de Exportadores de Flores* v. *United States,* 12 CIT ——, Slip Op. 89-3 at 12-13 (January 6, 1989).

b. *Verification of Broker Consignment Sales Data*

Plaintiffs allege that their brokers may be selling at higher prices than plaintiffs' own records indicate. They produced no data to demonstrate this, but claim that ITA should not have accepted the producers records, and should have instead verified data on the premises of each broker. There is no requirement that ITA verify transaction data on both the principal and agent sides. To do so would seem overly burdensome. Furthermore, the court will not order ITA to conduct further verification based on plaintiffs' speculation.

4. *Constructed Value*

a. *Use of Best Information Available in Lieu of Verifiable Grower Cost Data*

Certain growers did not fully respond to ITA's questionnaire. Plaintiffs allege that they did not respond because pursuant to local accounting practice they did not keep cost records. There is no dispute as to the existence of this local accounting practice. Accordingly, ITA used best information available to fill in any gaps in its cost of production data for constructed value purposes. ITA is not required to use only information that is kept in accordance with local standards. ITA must make adjustments in order that the information it does accept from respondents will reflect reality. *Cf. Ipsco, Inc.* v. *United States,* 12 CIT ——, 687 F. Supp. 633, 636 n.3 (citing

[8]Plaintiffs also made the argument that actual home market sales should have been used for certain producers rather than constructed value because ITA's use of an average for U.S. price, which included distress sales, rendered the comparison with constructed value unfair. ITA determined that the relative volume of home market sales was too low to permit use of such sales. Plaintiffs have not offered any evidence based on which the court must conclude that home market sales were adequate. In any case, plaintiffs abandoned their main argument supporting this objection.

H. Rep. No. 571, 93rd Cong., 1st Sess. 71 (1973) and 19 U.S.C. § 1677b(b).) ITA determined here that the growers' cash-basis accounting methods did not take into consideration certain actual costs, for example, those attributable to depreciation. 52 Fed. Reg. at 6363.[9] Where data was missing, ITA properly used data from other sources. *See* 19 U.S.C. § 1677e.

b. *Allocation of Costs Based on Acreage of Plantings*

Where cost data was not identifiable by flower type, ITA allocated on an acreage planted basis. 52 Fed. Reg. at 6364. Plaintiffs have not provided any persuasive reasoning that allocation based on sales volume, as they propose, is a reasonable approach to the problems at hand, let alone the only rational approach. ITA is not responsible for the fact that the growers do not maintain complete cost data. ITA had to arrive at a methodology to deal with gaps of information. Its approach has not been shown to be unreasonable.

c. *Other Arguments re Constructed Value*

The court will not consider objections which are not supported by proper citations to the record, such as objections to certain salary costs, and failure to allocate start-up costs.[10]

5. *Level of Trade Adjustment*

In their brief to the court, plaintiffs argue that ITA should have made a level of trade adjustment, pursuant to 19 C.F.R. § 353.19 (1988), because Mexican home market sales were often made in small quantities and directly to retailers whereas U.S. sales were "almost always in bulk to wholesalers." Plaintiffs' Brief at 46. Defendant responds that this claim must be rejected because plaintiffs failed to raise it before the agency.

ITA regulations make clear that the party which alleges entitlement to a level of trade adjustment must "establish entitlement thereto to the satisfaction of the Secretary." 19 C.F.R. § 353.13. Plaintiffs did not respond to defendant's argument that this claim must be rejected because it was not made at the administrative level, nor does the record indicate that this claim was pursued at the administrative level. Defendant also contends that without evidence of differing prices at various levels it would not make a level of trade adjustment. Defendant states this information is lacking and plaintiffs have not cited either direct or indirect evidence as to differing prices. Plaintiffs have the burden of supporting their claim for a level of trade adjustment. *See Fundicao Tupy S.A.* v. *United States,* ——, 678 F. Supp. 898, 900 (1988), *aff'd* No. 88–1233 (Fed. Cir. Oct. 19, 1988); *cf. American Permac* v. *United States,* 12 CIT ——, Slip Op. 88–164 (Dec. 1, 1988). Plaintiffs have failed to meet that burden.

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[9]Plaintiffs claim all property was previously fully depreciated. Plaintiffs do not assert whether this reflects reality, but plaintiffs cited no record evidence concerning depreciation.

[10]Plaintiffs made another objection concerning the Concurrence Record of the Final Determination Calculation. The significance to plaintiffs of the alleged error was not explained.

B. *ITC Issues*

ITC's final determination in this matter, *Certain Fresh Cut Flowers from Peru, Kenya and Mexico,* USITC Pub. 1968, Inv. No. 303–TA–18 and Inv. Nos. 731–TA–332 and 333 (April 1987) (*Flowers II*) refers to many conclusions reached in *Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, and The Netherlands,* USITC Pub. 1956, Inv. Nos. 701–TA–275 through 278 and Inv. Nos. 731–TA–321 through 331 (March 1987) (*Flowers I*). Both determinations are necessary to an understanding of the ITC Issues raised here.

1. *Defects in ITC's U.S. Grower Questionnaire Methodology*

Plaintiffs contend that ITC's method of collecting industry data was improper for several reasons, each of which will be discussed separately.

a. *Selection of Population*[11]

Plaintiffs' basic argument in this regard is that ITC did not review the list of questionnaire recipients compiled by the Department of Agriculture (USDA). ITC did not review what USDA did because USDA's master list is confidential. Because ITC did not review directly what USDA did, the court, in turn is unable to review what USDA did. Plaintiffs have not established, however, that ITC was incorrect in concluding from public information about USDA's data that it was the most comprehensive available.[12] Thus, if USDA was to be rejected as a source of U.S. grower identification it would be solely because of the confidentiality problem.

Plaintiffs legal contention is that ITC's use of the mailing lists compiled by USDRA for ITC constituted an unlawful delegation of ITC's authority. Reviewability is the key to avoidance of delegation problems. *See Pistachio Group of the Ass'n of Food Indus.* v. *United States,* 11 CIT ——, 671 F. Supp. 31 (1987). As ITC set the criteria for compilation of the mailing list and as ITC's directions to USDA are not a source of dispute, the only question which arises is whether USDA actually did what it was requested to do by ITC. This is the only potentially unreviewable action. There is, however, no evidence that USDA performed anything but a ministerial act in compiling the ITC list from its master list. Therefore, there is no partially or fully discretionary function assigned to ITC by the Congress which ITC has in turn assigned to another. This factor alone distinguishes this case from *Pistachio Group,* on which plaintiffs rely.

In addition, plaintiffs have not pointed to any information of record which would indicate that only certain classes of individuals responded. This might be evidence that USDA did not do what ITC instructed. Nor has plaintiff cited any reason why the court should

[11] The court rejects plaintiffs' argument that the small response, by itself, indicates invalid selection methodology. One would not expect a large response to a lengthy questionnaire in an industry composed of numerous small owner-operated agricultural concerns.

[12] USDA's list contained 457 grower names while ITC's internal list named 152 growers. *Flowers I* at A–7.

assume that USDA had some motivation for not following ITC's direction.

Obviously, it is preferable for ITC's purposes, as well as for the purposes of those affected by ITC's determination, if access to mailing lists used for ITC investigations may be made available to ITC. Many of ITC's choices, however, rest on utilization of public information, the background data for which may be confidential. This does not bar the use of the end result data. This situation is similar. Here, ITC apparently decided that despite the disadvantage of lack of direct access to the USDA data, it would make a choice in favor of comprehensiveness. This was a reasonable choice. As there is no data which would cause one even to suspect that USDA did not do as it was instructed, the court does not find any error to have occurred in this regard.

Furthermore, ITC did not rely on USDA alone. It made its own mailing to 152 growers, 170 importers, and 100 purchasers. Undoubtedly, there was some overlap between the lists of growers compiled by ITC and USDA.

Plaintiffs also object that ITC relied on petitioner's data in compiling its lists and ignored data submitted by Florists' Transworld Delivery Association (FTD). The record indicates that both FTC and FTD data was considered. PR 195. (It should also be noted that FTD suggested that USDA list as the most comprehensive.)[13] After questionnaires were mailed and after the due date for the responses, FTD submitted further information to ITC. It was not unreasonable for ITC to reject such data, which would have required a supplemental mailing.

b. *Review of Grower Responses by FTC*

Plaintiffs object to FTC's review of grower responses by FTC before they were submitted to ITC. Some 86 domestic growers chose to send their responses through FTC, a trade association of domestic growers. FTC then forwarded the responses and also sent a list of corrections. ITC chose what consideration to give to the corrections. Plaintiffs have not demonstrated that they have been injured in any way by what appears, in any case, to be an acceptable procedure.

c. *Selection of Periods for U.S. Price Data Collection*

Plaintiffs allege that ITC's conclusion as to the price depressive effects of Mexican imports is based on data from periods during which price underselling by Mexican imports is likely to occur rather than on a balanced sampling of periods, which would include post-holiday periods of distress sales, at more uniform prices. ITC chose six non-holiday weeks and six holiday weeks. ITC also relied on broad ranging data provided by USDA.

[13]That USDA's listing might have included some growers who did not produce the flowers at issue is of little concern. The responses call for an indication of what flowers are actually grown.

Both importers and growers appeared to agree that it was important to look at holiday and non-holiday periods. Additional investigation of post-holiday distress sales data would not add a great deal of useful information to this record. ITC seeks to arrive at a general conclusion about price underselling over a three year period of time. Its conclusion is not quantified. (In contrast, ITA's margin determination is a quantification.) ITC's data was adequate for it to reach an overall conclusion about price depression.

2. *Cumulation*

Plaintiffs allege that ITC erred in cumulating imports of Mexican flowers with imports under investigation from other countries. Pursuant to 19 U.S.C. § 1677(7)(c)(iv) (Supp. IV 1986), ITC must cumulatively assess the volume and price effects of imports which are subject to investigation and which compete with each other and like U.S. products. Plaintiffs argue that because other imports were entered through different ports of entry than were Mexican imports, that Mexican imports did not compete with others. Plaintiffs also allege different channels of trade and failure to separately assess competition for various flower types.

In assessing whether there was competition among the various imports from different countries, ITC considered fungibility; sales or offers for sales in the same geographic markets, similarity in channels of distribution and simultaneity of presence in the market. *Flowers I* at 15. In *Flowers I,* ITC clearly indicated it made its cumulative analysis by separate flower type. *Id.* at 18. On the issue of cumulation, no significant information was submitted to ITC between the issuance of *Flowers I* and the close of the record in *Flowers II.*

As to plaintiffs' argument that competition between Mexican imports and other imports is limited because of differing ports of entry, the record does not indicate the existence of only local markets. The record does indicate substantial shipment of flowers throughout the United States and interrelated channels of distribution with competition at various levels. While Houston may be the major port of entry for Mexican flowers, the record indicates importation of Mexican flowers through other ports. It also indicates entry of other imports through Houston. Completely overlapping markets is not required. *See Fundicao Tupy,* 678 F. Supp. at 902.

3. *Substantial Evidence for ITC's Finding of an Injured Industry*

First, as to the issue of the state of the domestic industry, the court has sustained the view of the ITC majority that the industry involved is actually several industries. *See Asociacion Colombiana de Exportadores de Flores* v. *United States,* 12 CIT——, 693 F. Supp. 1165, 1170 (Remanded). That finding, which would seem to be applicable here, is not disputed by plaintiffs. It also was not challenged following the above-mentioned remand on other grounds. *See*

Asociacion Colombiana de Exportadores de Flores v. *United States*, 12 CIT——, Slip Op. 88–172 (Dec. 27, 1988). Thus, the overall health of the U.S. flower industry in general, which includes producers of non-investigated flowers, is irrelevant.

Second, as to the state of the three relevant industries there is some conflicting evidence, which ITC considered according to proper procedures, as indicated previously. Each industry will be considered separately.

a. *Standard Carnations*

In support of their belief that the domestic industry producing standard carnations was uninjured, plaintiffs cite a rise in domestic shipments as well as rising net sales. While acknowledging rising net sales and a slight rise in domestic shipments in 1984, ITC noted declining domestic shipments in subsequent years, declining market share and declining net income. *Flowers I* at 24–26. As plaintiffs do not challenge the existence of the basic data, but only the conclusion to be drawn from such data, this appears to be a case of weighing less than conclusive data. Based on this record the court holds that ITC's finding of an injured standard carnation industry is supported.

b. *Standard Chrysanthemums*

Regarding standard chrysanthemums, plaintiffs indicate that although U.S. shipments declined, imports declined by much greater percentages. ITC noted recent declining domestic consumption, overall declining production and shipments and insufficient recent improvement in market share and net income to overcome the general decline. *Id.* at 28–31. The same problem exists as to plaintiffs' argument in this regard as existed with regard to the standard carnation industry. Based on this record the court holds ITC's finding of an injured chrysanthemum industry is supported.

c. *Pompon Chrysanthemums*

Plaintiffs cite increased domestic consumption and a rise in domestic production during certain periods in support of their argument that the domestic pompon chrysanthemum industry is uninjured. ITC cited declines in production in other periods as well as declines in shipments, market share, net sales and net income (between 1983 and 1985). *Id.* at 33–35. As with the other two industries the court finds ITC's determination of an injured pompon chrysanthemum industry is supported.

4. *Causation*

Plaintiffs also allege that ITC's finding of a link between imports and material injury is unsubstantiated. Plaintiffs cite nothing to support their allegation with regard to standard carnations. With respect to standard chrysanthemums, plaintiffs allege that the fact that imports were declining at a faster rate than domestic shipments demonstrates no casuality. Additionally, plaintiffs attribute

declining domestic production to declining yields per square foot. ITC, instead, focused primarily on price effects, which plaintiffs do not discuss. ITC did not err in focusing on price effects in reaching its causation conclusion. This is a standard and long accepted approach. The court finds that ITC's methodology was not in error and ITC's decision is not unsubstantiated.

As to pompon chrysanthemums, plaintiffs blamed the condition of the U.S. industry on weather. Plaintiffs ignores that imports need not be the only cause of harm. *See British Steel Corp.* v. *United States,* 8 CIT 86, 593 F. Supp. 405 (1984). The record does not show that weather, and not imports, contributed to the material injury observed. ITC could conclude based on this record that both caused harm. Plaintiffs also claim that foreign producers produced more marketable pompons and served customers better. Plaintiffs, however, have not challenged ITC's finding that U.S. chrysanthemums were "like" the foreign chrysanthemums, nor have they indicated that ITC should make certain specific adjustments for differences in quality. Furthermore, injury need not be based on a finding of injury by specific price underselling. ITC may consider, as it did, the suppressive price effects of the unfairly traded imports. ITC made a choice between one view which the court finds supported and another view, which might also be supported. This is not grounds for rejection of the determination.

Conclusion

The final determinations of the ITC and ITA are sustained.

(Slip Op. 89–5)

L'Eggs Products, Inc., plaintiff *v.* United States, defendant

Court No. 86–05–00644

Before Re, *Chief Judge.*

Memorandum Opinion and Order

The Customs Service classified certain imported pantyhose under item 384.86, TSUS. Upon liquidation, allowance was made under item 807.00, TSUS, for the cost of the sewing yarn or thread, the gusset, the garment labels, and the plastic bags and stickers, all products of the United States. No allowance was made for the cost or value of the knit tubes, or leg blanks, in each pair of pantyhose because the leg blanks were not "fabricated components * * * ready for assembly without further fabrication * * * and have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process * * *," as required by item 807.00, TSUS. The plaintiff contests the denial of allowance for the leg blank portions under item 807.00, TSUS. Plaintiff and defendant move for summary judgment.

Held: The Court concludes that there are no material issues of fact in dispute. Since the Customs Service improperly denied allowance for the leg blank portions

under item 807.00, TSUS, plaintiff's motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied.

[Plaintiff's motion for summary judgment is granted; defendant's cross-motion for summary judgment is denied.]

(Dated January 12, 1989)

Stein Shostak Shostak & O'Hara (*S. Richard Shostak* on the brief and at oral argument and *Robert Glenn White* on the brief), for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Michael T. Ambrosino* on the brief and at oral argument) and (*Ted Y. Chong*, United States Customs Service, of Counsel), for defendant.

RE, *Chief Judge:* The question presented in this case is whether knit tubes or leg blank portions of pantyhose manufactured by plaintiff, L'eggs Products, Inc., and imported into the United States from Colombia, are entitled to a duty allowance under item 807.00, of the Tariff Schedules of the United States (TSUS).

The components of the pantyhose, which consist of the sewing yarn or thread, the gusset, the garment labels, the two tubes (with open tube ends), and the plastic bags and stickers, were all products of the United States exported to Colombia for assembly. When the articles were imported into the United States, they were classified for customs purposes under item 384.86, TSUS, as "[o]ther women's, girls', or infants' wearing apparel, not ornamented * * * [o]f manmade fibers," with duty at 23.6 percent *ad valorem* plus $0.10 per pound. Plaintiff received an allowance under item 807.00, TSUS, for the cost of the sewing yarn or thread, gussets, garment labels, plastic bags, and stickers. No allowance, however, was made for the cost of the tubes. The Customs Service determined that the closing operation performed on the tubes in Colombia was a further fabrication, and that it was not an assembly process or a process incidental to assembly.

Plaintiff does not dispute the classification, but challenges the refusal of the Customs Service to make an allowance for the cost or value of the tubes under item 807.00, TSUS.

Item 807.00, TSUS, pursuant to which the allowance is claimed, provides:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.
>
> * * * * * * *
>
> A duty upon the full value of the imported article, less the cost or value of such products of the United States * * *

It is not questioned that all three parts of item 807.00 must be satisfied before a component may receive a duty allowance. *See Zwicker Knitting Mills* v. *United States,* 82 Cust. Ct. 34, 36, C.D. 4786, 469 F. Supp. 727, 729 (1979), *aff'd,* 67 CCPA 37, C.A.D. 1240, 613 F.2d 295 (1980). As section (b) of item 807.00 is not in dispute, the question is whether Customs was correct in denying an 807.00 allowance to the tubes because, in its view, the merchandise as imported did not satisfy the requirements of sections (a) and (c).

Contending that there are no material issues of fact in dispute, both parties move for summary judgment pursuant to Rule 56 of the Rules of this Court. Upon examining the tariff schedules, relevant case law, the merchandise, and supporting papers, the court concludes that there are no material issues of fact in dispute, and that the Customs Service erred in denying the prescribed duty allowance for the tubes under item 807.00, TSUS. Hence, plaintiff's motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied.

In deciding cross-motions for summary judgment, it is fundamental that "the court must determine if there exist any genuine issues of material fact and, if there are none, decide whether either party has demonstrated its entitlement to judgment as a matter of law." *American Motorist Ins. Co.* v. *United States,* 5 CIT 33, 36 (1983). It is also basic that "the court cannot try issues of fact on a summary judgment motion, it can only determine whether there are factual issues to be tried." *Yamaha Int'l Corp.* v. *United States,* 3 CIT 108, 109 (1982). Furthermore the Supreme Court has stated that "the mere existence of *some* alleged factual dispute * * * will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986) (emphasis in original).

In support of its motion, plaintiff stresses that the tubes "at the time of their exportation, for assembly abroad, place them comfortably within controlling definitions of 'fabricated components * * * ready for assembly without further fabrication' as required by item 807.00(a), TSUS." The plaintiff submits that the "sewing closed" of the tubes is a conspicuous example of an "assembly process." Alternatively, plaintiff states that the "sewing closed" of the tubes, "whether measured by time, cost, or technique is in any event an operation that is certainly incidental to complete the pantyhose assembly process." Consequently, the plaintiff contends that the tubes are entitled to a duty allowance because they fulfill the three requirements of item 807.00, TSUS.

Defendant opposes plaintiff's motion and maintains that the tubes, as exported to Colombia, "are incomplete in that the toes had not yet been constructed." Hence, the defendant contends that the tube or "toe closing" operation was a "further fabrication necessary to complete or finish the tubes." The defandant also maintains that

the tube closing operation is not an assembly operation because assembly means the joining of two or more separate components, rather than the completion of a single component, i.e., the tube. Finally, the defendant contends that the tube closing process is "unrelated to the assembly of the other exported components," and, therefore, is not an incidental process of the assembly. Hence, the defendant contends that the tubes do not fulfill the requirements of sections (a) and (c) of item 807.00, TSUS, and, consequently, do not qualify for an allowance.

It is evident from the submissions that there is no material issue of fact in dispute. What is at issue is whether the knit tubes or leg blank portions of the merchandise meet the requirements of sections (a) and (c) of item 807.00, TSUS. This issue is a question of law and not an issue of fact. As with other statutory provisions, it is the function of the court to interpret the tariff schedules in a manner that will carry out the intent of Congress. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Sandoz Chem. Works, Inc.* v. *United States*, 43 CCPA 152, 156, C.A.D. 623 (1956).

The procedure or steps required in the production of the merchandise in issue were described in the affidavits of several persons associated with plaintiff, which were submitted with plaintiff's motion for summary judgment.

These affidavits indicate that it was plaintiff's usual procedure to accomplish all the knitting and dyeing in the United States, and then send the components, including the tubes, gussets, sewing yarn or thread, and labels, to Colombia for assembly. Until 1985, the tubes which were assembled for return to the United States, were sent to Colombia with the tube ends closed because Customs would not accord an item 807.00 allowance to the tubes. Nonetheless, in 1985, plaintiff determined it would be less costly and more labor efficient to have the ends of the tubes also closed in Colombia. Thus, in order to resolve the question of whether the sewing of the tubes was permissible under item 807.00, plaintiff decided to send twelve dozen pairs of pantyhose to Colombia with open toes as part of a special "test shipment."

In all shipments but the test shipment, an item 807.00 allowance was extended to all United States components. No allowance, however, was made for the tubes closed in Colombia on the test shipment, and this action followed.

The tubes produced by plaintiff for use in pantyhose are constructed in the United States using a different machine and thread than is used to sew the components into pantyhose. The tubes are knit on a four inch diameter circular 1200 R.p.m. knitting machine using a 40 denier spandex yarn covered at the rate of 34 wraps per inch with a 20 denier 8-ply nylon yarn. The knitting machine knits tuck stitches in the last 16 courses of the tubes to prevent unraveling. The tubes are then dyed to the desired color.

The tubes are sewn together in pairs along with a gusset, which is a small piece of material inserted into the merchandise to improve the fit and for reinforcement. This sewing procedure, which forms the upper portion of the pantyhose, is performed using a 6500 R.p.m. "overedge" sewing machine, which also trims the fabric in the sewing seams. The tube ends are sewn together using the same sewing machine and thread. Each tube is turned inside out, and then the sewing machine operator aligns the tube ends and sews them together. It is important to note that, although the supporting papers speak of a toe end closing, the procedure is more accurately described as a tube end closing, since the open ended tubes have no toe shape or structure.

Plaintiff introduced, as an exhibit, a video tape of the pantyhose assembly operation. It also introduced into evidence samples of the pantyhose before the tube closing operation, and samples after the tube closing process, as imported into the United States.

The initial question, in determining whether the tubes comply with the requirements of item 807.00(a), TSUS, is whether the tube closing operation performed in Colombia constituted a "further fabrication." It is not questioned that "if there was a 'further fabrication,' the [tubes] * * * do not meet the statutory requirements of clause (a) of item 807.00, TSUS." *Zwicker,* 82 Cust. Ct. at 38, 469 F. Supp. at 730.

Plaintiff stresses that the tubes, at the time of their exportation, were fully knit and prevented from unraveling by tuck stitches, and, therefore, no further fabrication of any kind was necessary to form the tubes. Hence, the leg tubes were fully fabricated components ready for assembly into pantyhose. Furthermore, plaintiff contends that "the mere process of sewing the tubes closed using the same sewing machine and sewing thread used in the assembly of the upper portion of the pantyhose cannot constitute a further fabrication of the merchandise."

Defendant contends that the tubes were not "exported in a condition ready for assembly without further fabrication." According to defendant, the tube or toe closing operation was fabrication rather than assembly "because it constructed a portion of the pantyhose that did not exist before, namely the toes."

A case which presents a thorough discussion of what constitutes a further fabrication is *Zwicker Knitting Mills* v. *United States,* 82 Cust. Ct. 34, C.D. 4786, 469 F. Supp. 727 (1979), *aff'd,* 67 CCPA 37, C.A.D. 1240, 613 F.2d 295 (1980). In *Zwicker* it was stated that "there is no one, all-embracing definition of what steps or processes constitute a 'further fabrication' within the meaning of item 807.00, TSUS. Whether a particular process constitutes a 'further fabrication' depends upon the facts of the particular case." *Zwicker,* 82 Cust. Ct. at 39, 469 F. Supp. at 730. The court in *Proctor & Gamble Distrib. Co.* v. *United States,* 11 CIT ——, Slip Op. 87–72, at 4 (June 24, 1987), also observed that "the sewing and knitting cases

seem to indicate that such operations are fabrications only if they create the basic article."

The question presented in *Zwicker* was whether certain imported knit glove shells were entitled to a duty allowance under item 807.00, TSUS. More specifically, the issue was whether the procedure by which the fingers of the gloves were closed constituted an assembly, or a further fabrication. In that case, the machines used to knit the gloves in the United States could not complete the fingertips of the glove shells. Thus, the open-fingered glove shells, precut palms, and a separate piece of yarn were sent to Haiti. There, the knitting process was completed and the glove fingers were closed or "tipped." The trial court described the tipping operation as follows:

> In the first step in the "tipping" operation, the yarn "floats," which are continuations of yarn between the open fingertip and base of the finger, were cut at the base of the finger. The glove finger was placed over a metal post large enough to fill a glove finger. The top row of the knitted loops was unraveled to expose new, clear loops. A dulled needle was threaded with the yarn "float" and passed through the row of loops on one side of the fingertip. The needle and yarn were pulled through, the glove was turned on the post and the needle and yarn pulled through the loops on the other side of the fingertip. The top rows of stitches on each side were pulled together by stitches across the top of the fingertip about three-quarters of the way across before three tacking or stay stitches were made. On the fourth tacking or stay stitch, the needle was brought down inside the finger and out. The yarn was then trimmed. This process was repeated for each of the five fingertips of the knitted glove shells.

Zwicker, 82 Cust. Ct. at 37–38, 469 F. Supp. at 729–30.

The trial court in *Zwicker* determined that the tipping procedure was "clearly a 'further fabrication' because it actually *constructs* a portion of the glove that did not exist before, namely the fingertips." *Id.* at 41, 469 F. Supp. at 732 (emphasis in original). The trial court found that the tipping operation had to be completed after the kitting of the glove shall "since without the 'tipping' the yarn would unravel during the brushing and steamping steps." *Id.* at 41, 469 F. Supp. at 733.

An important or crucial element of the holding of *Zwicker* was that the "tipping operation" of the glove shells required a significant amount of labor. As the trial court explained:

> [T]he only hand labor required in the manufacturing process in the United States was cutting and separating the knit glove shells as they came off the knitting machines. When the knit glove shells were exported from the United States, they were knit only to the extent that the knitting machines were capable of knitting on these particular styles. They were not in fact completely knit. It was left to the *intensive labor,* by hand, in

> Haiti to finish the fabrication process commenced in the United States.

Id. at 41, 469 F. Supp. at 732 (emphasis added).

The Court of Customs and Patent Appeals affirmed the decision of the *Zwicker* trial court and specifically stated that the condition of the glove shells as exported to Haiti was unfinished. *Zwicker,* 67 CCPA 37, 40, 613 F.2d 295, 297. The court stated that "[s]ince only two of the three stages in the knitting process were performed in the United States prior to exportation, we conclude that the glove shells were unfinished when they left the United States." *Id.*

In contrast, the tubes in this case were not unfinished but were "fully fabricated." There was no further weaving or knitting required prior to assembly, and there was only some trimming of a small amount of fabric from the seam. Unlike *Zwicker,* which required the construction of the fingertips, here, no new portion of the tube was constructed or "fabricated" by the operation. The defendant argues that the tubes in this case are "incomplete in that the toes have not yet been constructed," and that the tube closing is a further fabrication because it "completes the pantyhose rather than merely being part of the assembly."

It is to be noted that item 807.00, TSUS, speaks of fabricated components in a "condition ready for assembly without further fabrication." The tubes in question required no further fabrication since they were fully constructed, and were secure from unraveling by the tuck stitches. The defendant, nonetheless, argues that the tube or toe closing operation "created a new portion of the pantyhose, the toes." This assertion, however, is incorrect, since an examination of the merchandise shows that no toe or toe portion is created or constructed. The tubes are merely sewn closed at the ends, and have no foot or toe shape or structure. The tube closing process merely prepares the pantyhose for use, and the tubes do not acquire a foot or toe shape until worn.

Furthermore, unlike the operations performed on the knit glove shells in *Zwicker,* the tube end closing operation does not require a significant amount of labor. In *Zwicker,* the tipping operation performed abroad "required half as much time as the knitting of the entire glove shell," and the cost of the tipping operation was greater than the cost of the knitting operation of the entire glove shell. *See Zwicker,* 82 Cust. Ct. at 42, 469 F. Supp. at 733. In contrast, the only work performed abroad on the tubes is "sewing them closed using the same sewing machines and sewing thread used in the assembly of the upper portion of the pantyhose."

As stated in the affidavit of Mr. Herve Roche, international manager for plaintiff, the actual sewing time to close the tubes is 1.4 seconds. Mr. Roche adds that "when the handling time is added to the actual sewing time, the sewing closed ranged from 13.6 percent to 16.6 percent of the total time then expended in Colombia to complete a pair of pantyhose." According to Mr. Roche, the total tube

end closing process amounted to "less than 2 percent of the total time."

On the question of the cost of the tube end closing operation the affidavit of Mr. August Pike, director of industrial engineering for plaintiff, is enlightening. Mr. Pike states:

> In 1984–1985, the cost to sew the tube-ends closed in Colombia was less than 3 percent of the total cost of knitting, sewing, and packaging the pantyhose. The greatest expense in producing a pair of pantyhose is the cost of knitting and dyeing the tubes, which constitutes about 80 percent of the total cost of the pantyhose. The cost of sewing the tube-ends closed is a small portion of the total production cost. Based on current costs for a pair of pantyhose * * * the cost of sewing the tube-ends closed in a modern-equipped facility including handling time, is only 1.0 percent of the total cost of the pantyhose.

It is clear, therefore, that the tube closing operation in this case is neither labor intensive nor costly, and is at best a simple operation of a minor nature. In sum, the tube closing consists simply of adding a piece of thread to fabric, a procedure which constitutes less than 2 percent of the total manufacturing process. Hence, it cannot be questioned that the time and cost required to close the tubes was slight compared to the time and cost required for the manufacture and assembly of the entire pantyhose.

The Customs Service, in its determination to deny an 807.00 allowance to the tubes, relied heavily on the *Zwicker* case. *See* Priv. Ltr. Rul. 553105 (Dec. 31, 1984). Previously, the practice of the Customs Service was to grant a duty allowance under 807.00 for tubes which had the tube ends sewn closed abroad. *See* Priv. Ltr. Rul. 041987 (Sept. 19, 1975). The Customs Service, in that ruling stated, "[i]tem 807.00, TSUS, is not precluded where fabricated components, such as the tubes, are exported and assembled abroad and the toe section of the tubes are sewn closed in conjunction with the assembly operations." The plaintiff in this case applied for a ruling on the item 807.00 allowance for tubes which had the tube ends sewn closed abroad. In response, the Customs Service, citing the *Zwicker* case, disapproved the 807.00 allowance, thereby reversing its prior position. Priv. Ltr. Rul. 553105 (Dec. 31, 1984). A close reading of *Zwicker*, shows that it is distinguishable from the tube end closing process in the present case, and that it is not authority to prevent an 807.00 allowance for the merchandise in issue.

Defendant's additional contention is that "the toe closing operation does not fall within the meaning of assembly because it does not involve the joining of two separate components but rather the completion of a single component, namely the tube." According to defendant, "[t]he law is clear that assembly requires the joining of two or more solids, parts or pieces."

Judicial and lexicographic definitions of assembly indicate that assembly means to fit or join two or more components or parts. *See*

Zwicker, 82 Cust. Ct. at 43–44, 469 F. Supp. at 733–34. Nonetheless, plaintiff asserts that the tube closing operation is an assembly operation rather than further fabrication because there are, in fact, two components, namely, the thread and the fabric.

In support of its contention plaintiff cites the case of *Baylis Bros. Co.* v. *United States,* 64 Cust. Ct. 256, C.D. 3987 (1970), *aff'd,* 59 CCPA 9, C.A.D. 1026, 451 F.2d 643 (1971), *modified,* 474 F.2d 1026 (1973). In *Baylis* the question presented was whether certain imported dress fronts, which were shirred or smocked outside of the United States, were entitled to a duty allowance under item 807.00, TSUS. The specific issue was whether the smocking operation performed abroad constituted assembly, or further fabrication. The merchandise in *Baylis* consisted of precut dress fronts which were "cut into pieces of a predetermined size and shape, and a design made up of dots was stencilled on the fabric pieces * * *. The cut and stencilled pieces of fabric * * * were exported to Barbados, where the smocking operation took place." *Baylis,* 59 CCPA at 10, 451 F.2d at 645. Smocking is the process whereby "shirrs" are created by sewing thread through the predetermined stencilled dots to obtain gatherings of material. The smocking did not involve sewing the precut dress fronts to any other piece or pieces of fabric.

The trial court in *Baylis* held that the smocking operation constituted "an assembly within the meaning of item 807.00 * * *." *Baylis,* 64 Cust. Ct. at 260. The court stated that the imported merchandise was a new article different from its two component materials, "*the stencilled dress front and the thread used in making the gathered stitches on the dress front,*" *Id.* (emphasis added). In affirming, the Court of Customs and Patent Appeals stated:

> We agree with the conclusion of the Customs Court in that case [*C.J. Tower & Sons of Buffalo* v. *United States,* 62 Cust. Ct. 643 (1969)] that 'the term [assembly] is used to describe the joining or coming together of solids.' We find that the smocking operation is well within the common meaning of the term 'assembly,' since the operation merely consists in joining the two components together according to the stenciled designs.

Baylis, 59 CCPA at 11, 451 F.2d at 645.

In this case, the defendant asserts that the addition of thread to a piece of fabric constitutes the completion of a single component not the assembly of two or more components. Yet *Baylis* involved only the addition of thread that was sewn through stencilled dots to obtain gatherings of material or shirrs. The two components in *Baylis* were the fabric and the thread. These are precisely the same components used in this case.

Although not cited by the parties, the court has found a Customs Service decision which concluded that "the mere joining of a component to itself does not constitute an assembly for purposes of item 807.00, TSUS." C.S.D. 84–106, 18 Cust. B. & Dec. 1090 (May 15, 1984). The merchandise involved in that ruling was glove shells

which were fabricated in the United States and sent abroad where the top two inch portion of the wrist end of the glove shell was turned inside the glove shell and the edge sewn to it. The ruling states that "[t]he material utilized to accomplish the joinder * * * is not considered to be a fabricated component. Accordingly, * * * where a piece of fabric is folded and sewn or otherwise fastened to itself, there is only a single component involved and, therefore, the joinder cannot be considered an assembly of two or more components, as required by the statute." 18 Cust. B. & Dec. at 1091. The Customs Service in that ruling also stated that although *Baylis* appeared to conflict with its view, *Baylis* was distinguishable. According to the Customs Service, the thread in *Baylis* "acts as more than a simple binding agent," since "by putting the thread through the stenciled holes and gathering the fabric, an elasticity is produced which allow[s] the dress to contract or expand." *Id.* at 1092.

The cited Customs Service ruling, however, misreads *Baylis,* as the court in *Baylis* does not discuss the purpose of the threat in determining whether it is a component. The Court of Customs and Patent Appeals in *Baylis* did not state that the thread must have a function other than as a joining agent, but, rather, clearly held that the thread was a component in addition to the fabric. In affirming the holding of the Customs Court, which granted the 807.00 allowance, the appellate court stated that, "the smocking operation is well within the common meaning of the term assembly, since the operation merely consists in joining the two components together * * *." *Baylis,* 59 CCPA at 11, 451 F.2d at 645.

Moreover, it is axiomatic that when a tariff statute has been construed by the court, it is the judicial decision and not the administrative practice which is controlling. Therefore, in view of the precedent in *Baylis,* that thread is a component, the cited Customs Service ruling is neither binding nor persuasive. *See The Ferriswheel* v. *United States,* 84 Cust. Ct. 61, 69, C.D. 4844, 489 F. Supp. 263, 268 (1980), *aff'd,* 68 CCPA 21, C.A.D. 1260, 644 F.2d 865 (1981).

To argue that the joining of a component to itself with thread is not an "assembly" is contrary to the holding in *Baylis.* The trial court in *Zwicker,* in describing the smocking process in *Baylis* stated that, "[t]he smocking did not involve sewing the precut dress fronts onto other pieces of fabric, but rather the sewing *gathered the fabric of the dress front to itself to create the shirrs." See Zwicker,* 82 Cust. Ct. at 44, 469 F. Supp. at 734 (emphasis added). The thread in *Baylis* was the joining agent which joined the fabric of the dress front to itself at predetermined points. In the present case, the thread joins the tube to itself by sewing the tube ends closed. As in *Baylis,* the thread is a component which serves as the joining agent. Since the tube closing operation joined two components together, namely thread and fabric, it is an "assembly" as the term was applied in *Baylis.*

Additionally, defendant cites *Surgikos, Inc.* v. *United States,* 12 CIT ——, Slip Op. 88–35, at 4 (March 18, 1988), to support its contention that the joining of an article to itself is not assembly. *Surgikos,* however, is clearly distinguishable from the present case. In *Surgikos,* this court held that finish folding or the folding in a specific way of surgical sheets was not an operation "incidental to the assembly process." The court, however, did not discuss the joining of a component to itself, since no binding or joining is involved in a folding process. Hence, a case which deals with a folding process is not pertinent, and cannot affect the precedential value of the holding in *Baylis.*

In summary, in *Zwicker,* the glove shells did not become a fabricated component "in a condition ready for assembly" until after the fingertips had been constructed. *Zwicker,* 82 Cust. Ct. at 45, 469 F. Supp. at 734–35. Here, as in the dress fronts in *Baylis,* the tubes were completely fabricated when the closing operation took place. Hence, since both here and in *Baylis* no further knitting was required and no new portion of the merchandise was constructed, *Baylis* is a controlling precedent.

In order to qualify for item 807.00 treatment, clause (c) requires that the articles "have not been advanced in value or improved in a condition abroad except by being assembled and except by operations incidental to the assembly process * * *." "[I]tem 807.00 logically assumes that there has been an advancement in value or improvement in condition of the article, and provided it is solely by virtue of the act of assembly" the merchandise may be accorded the statute's duty allowance. *See Carter Footwear, Inc.* v. *United States,* 11 CIT ——, Slip Op. 87–92, at 19, 669 F. Supp. 439, 444 (1987). Since the court holds that the tube closing operation is not further fabrication and is part of the assembly pursuant to item 807.00, TSUS, the merchandise has "not been advanced in value or improved in condition abroad except by being assembled * * *" thus, satisfying clause (c) of item 807.00. Hence, it is not necessary for the court to address the contentions of the parties as to whether the tube closing operation is "incidental to the assembly process * * *." *See* item 807.00, TSUS; *see also Carter Footwear,* Slip Op. at 12, 669 F. Supp. at 445.

Upon all the evidence of record, it is the determination of the court that the plaintiff has succeeded in rebutting the statutory presumption of correctness. 29 U.S.C. § 2639(a)(1) (1982). Having succeeded in establishing compliance with the requirements stated in clauses (a) and (c), plaintiff is entitled to the duty allowance claimed under item 807.00, TSUS, for the knit tubes or leg blank portions of the pantyhose in issue. Therefore, plaintiff's motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied. Judgment will issue accordingly.

ABSTRACTED CLASSIFICAT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	I
C89/1	Restani, J. January 4, 1989	A.N. Deringer, Inc	78-1-00011	Item 357.90, 657.20 or 657.25 Various rates	Ite
C89/2	Restani, J. January 4, 1989	Uniroyal, Inc.	80-6-00947	Item 357.90, 657.20 or 657.25 Various rates	Ite
C89/3	Restani, J. January 4, 1989	Uniroyal, Inc.	81-12-01688	Item 357.90, 657.20 or 657.25 Various rates	Ite
C89/4	Restani, J. January 4, 1989	Uniroyal, Inc.	81-12-01689	Item 357.90, 657.20 or 657.25 Various rates	Ite
C89/5	Re, C.J. January 12, 1989	Mitsubishi Int'l Corp.	82-10-01405	Item 700.85 700.95 12.5%	or
C89/6	DiCarlo, J. January 12, 1989	Pacific Trial Sportswear	86-9-01171	Item 379.95 Various rates	Ite

TION DECISIONS

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Item No. and rate		
tem 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O 85-94 (1985)	Champlain-Rouses Pt. Rubber hose
tem 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O 85-94 (1985)	Baltimore Rubber hose
tem 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O 85-94 (1985)	Champlain-Rouses Pt. Rubber hose
tem 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O 85-94 (1985)	Champlain-Rouses Pt. Rubber hose
r Item 700.35 8.5% Item 700.45 10% Merchandise dutiable on the basis of American selling price at the appraised values less 22% per pair	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	Baltimore Footwear
tem 376.56 10.6%	Agreed statement of facts	Seattle Man-made fiber outerwear apparel

C89/7	DiCarlo, J. January 20, 1989	Sealed Air Corp.	84-9-01299	Item 405.80 1.6c per lb. +16.2% or 1.5c per lb. + 16.2%	I
C89/8	Tsoucalas, J. January 20, 1989	Thomas & Betts Corp.	85-10-01455	Item 696.10 5%	I
C89/9	Restani, J. January 24, 1989	Leather's Best Inc.	78-10-01775-S	Item 121.58, 121.59, 121.60 or 121.61 55, 2% or 1%	I
C89/10	Tsoucalas, J. January 25, 1989	Pasco Specialty & Manufacturing Co.	88-7-00588	Item 706.62 20%	I
C89/11	DiCarlo, J. January 26, 1989	Border Brokerage Co.	80-7-01196	Item 660.85 4.5% Item 664.10 5% Item 678.50 5% Item 680.50 9.5% Item 680.54 9.5% Item 680.56 9.5%	I

Item 409.18 9% or 8.4%	Sealed Air Corp. v. U.S., S.O. 88-38 (1988)	Champlain-Rouses Pt. Polymeric isocyanates
Item 812.30 Free of duty	Agreed statement of fact	Baltimore Boat
Item 121.60 or 121.65 Free of duty or 3.8% 3.3%, 2.9% or 2.4%	Leather's Best Inc v. U.S., Ct. 84-4-00504-S	New York Leather
Item 657.25 5.7%	Agreed statement of facts	Los Angeles "Nipple Boxes"
Item 666.00 Free of duty	S. Madill, Ltd. v. U.S., Ct. No. 77-12-04978	Blaine Completely assembled tracked & rubber tired Madill 009, 071 and 004 Skidder Towers

ABSTRACTED VAL

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
V89/1	Tsoucalas, J. January 18, 1989	Puma USA, Inc.	86-12-01641	Export value or Amer selling price

LUATION DECISIONS

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
erican	$4.75 per pair + 5% +0.3% pkd or $9.00 per pair net pkd, or $17.40 per pair less 20%	Agreed statement of facts	Savannah Footwear

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